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# FEMINIST THEORY, PROFESSIONAL ETHICS, AND GENDER-RELATED DISTINCTIONS IN ATTORNEY NEGOTIATING STYLES.

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## I. INTRODUCTION

Mahatma Gandhi, when asked what he thought of Western Civilization, replied, "I think it would be a good idea." Some observers have said the same thing about enforcement of ethical standards in negotiation. Clearly, there are widely divergent views about the ethical responsibilities of lawyers engaged in negotiation<sup>1</sup> and, perhaps more significantly, about whether the bar can or should attempt to regulate the negotiating behavior of attorneys.

Historically, law has been a male-dominated profession; only recently has it become possible to consider the woman's experience and perspective with respect to law practice generally and negotiation practice in particular. This paper addresses two gender-related issues: first, are there identifiable gender-related distinctions in the negotiating behavior of attorneys? Second, if there are discoverable differences, are they attributable to ethical perspectives linked to gender? In addressing these questions, this article begins by reviewing the

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1. See, e.g., White, *Machiavelli & the Bar: Ethical Limitations in Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926, 926 (Professor James White's criticism of the ethical standards proposed in the draft of MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1979)).

literature on feminist theory, moral development, and negotiation theory. These themes are tied together in a review of the small but growing literature on negotiation ethics. We then discuss economic signalling theory and consider its implications for gender-related behavior differences. Finally, we report empirical and qualitative research that bears on these questions.

## II. MORAL PERSPECTIVE, GENDER, AND NEGOTIATION PRACTICE: FINDING THE NEXUS

The remarkable influx of women into law schools and the legal profession over the past twenty years has been accompanied by the emergence of rich feminist perspectives on legal theory, legal practice, and resulting policy and political implications. Debated in the legal literature is the contention that men and women have distinctly different orientations, not only to jurisprudential theories and a range of legal practices, including negotiation methods, but to moral development generally and professional responsibility in particular. Of particular relevance to the current discourse about gender differences in legal and ethical perspective is Carol Gilligan's work on the psychology of moral development.<sup>2</sup>

### A. Carol Gilligan's Care and Justice

In a book entitled *In a Different Voice*,<sup>3</sup> Carol Gilligan reports her investigation into the process of moral decision making. As she listened to the experiences of women dealing with personal dilemmas of moral conflict and choice, she compared the emerging pattern to prevailing conceptions of moral development.<sup>4</sup> Gilligan heard in the women a different voice, one not reflected in the psychological literature.<sup>5</sup> She concluded there are at least two moral voices and perspectives.<sup>6</sup> As summarized in a later work with Jane Attanucci, Gilligan finds these two voices are not mutually exclusive; they "are *both* represented in people's thinking about real-life moral dilemmas, but people tend to focus on one set of concerns and minimally represent the other" and although the categories are not necessarily gendered, women are more likely to focus on one and men on the other.<sup>7</sup> For convenience in discussing the implications of these voices, the present paper will speak as if the categories may be taken to represent experience grounded in gender. Adopting this convention, it can be said that Gilligan's work suggests that women and men have distinct moral orientations that stem from gender-related differences in basic assumptions about: a) the nature of moral

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2. C. GILLIGAN, *IN A DIFFERENT VOICE* (1982).

3. *Id.*

4. *Id.*

5. *Id.* at 1-2.

6. *Id.* at 1.

7. Gilligan & Attanucci, *Two Moral Orientations*, in *MAPPING THE MORAL DOMAIN* 73, 82 (C. Gilligan, J. Ward, and J. Taylor, eds. 1988).

dilemmas, b) the origin or source of the ethical conflict, and c) premises of ethical responsibility.<sup>8</sup> From these frameworks, we derive particular patterns of judgment, processes for resolving ethical problems, types of ethical discourse, and concepts of self in relationship to others.<sup>9</sup> Gilligan observes that for women, the moral obligation is to Care and to ensure that others are protected from harm.<sup>10</sup> This obligation arises from an awareness of personal relationships, the experience of connections to others, and a sense of empathy for the needs of all the parties involved.<sup>11</sup> A feminine ethic, according to Gilligan, views the involved persons as members of an interdependent and relational network.<sup>12</sup>

Prior to Gilligan, the literature on moral development was best represented by the work of Lawrence Kohlberg,<sup>13</sup> based primarily upon studies of boys and men. Gilligan claims the use of male subjects created a research bias favoring males and fails to reflect the experience of females.<sup>14</sup> The moral responsibility described by Kohlberg's research stresses values of justice, individual rights, and autonomy.<sup>15</sup> Gilligan interprets this to mean that men understand moral dilemmas as conflicts of rights or claims, with the result that relationships are subordinated to rules and principles.<sup>16</sup> Resolution of moral conflicts requires outcomes designed to protect individuals from interference. By this view, persons involved in a moral dilemma are independent selves who out of a sense of fairness, respect the others' autonomy. In this process, men resolve ethical conflicts by appealing to legal elaboration, fundamental principles, and universal abstractions as opposed to the feminine awareness of connecting relationships and empathy for the needs of both sides.<sup>17</sup> To distinguish between these two approaches, Gilligan labels them as Justice and Care.<sup>18</sup>

The following are characteristics associated with feminine and masculine morality proposed by Gilligan's *In a Different Voice*:

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8. See, e.g., C. GILLIGAN, *supra* note 2, at 19, 67.

9. See *id.* at 67.

10. *Id.* at 65.

11. See, e.g., *id.* at 73.

12. *Id.* at 30-31.

13. L. KOHLBERG, *PHILOSOPHY OF MORAL DEVELOPMENT* (1981); L. KOHLBERG, *THE PSYCHOLOGY OF MORAL DEVELOPMENT* (1984).

14. C. GILLIGAN, *supra* note 2, at 18.

15. See *id.* at 27 (Kohlberg's stages of development described by Gilligan).

16. *Id.* at 29.

17. See, e.g., *id.* at 32.

18. See, e.g., *id.* at 73, 167.

## **An Ethic of Care (Feminine Moral Perspective)**

Mode of judging associated with privacy of domestic interchange<sup>19</sup>

Virtue lies in self-sacrifice<sup>20</sup>

Wish to not hurt others<sup>21</sup>

Judgment divided<sup>22</sup>

Self-doubt or qualification of own voice<sup>23</sup>

Moral imperative is to care for others<sup>24</sup>

Underlying psychological logic of relationships<sup>25</sup>

Moral conflict is conflict of loyalties in relationships<sup>26</sup>

Moral dilemmas are conflicting responsibilities<sup>27</sup>

Personalized rather than objectified considerations<sup>28</sup>

Tolerant and willing to make exceptions<sup>29</sup>

Rely on process of communication<sup>30</sup>

Activates network of relationships<sup>31</sup>

Difficulty with competitive achievement<sup>32</sup>

Concerned for cost of success at another's failure<sup>33</sup>

Appears to evade dilemma and problem<sup>34</sup>

Concerned with resolution of real as opposed to hypothetical ethical dilemmas<sup>35</sup>

Judgment is contextual<sup>36</sup>

Defines self in relation to other people<sup>37</sup>

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19. See *id.* at 66.

20. *Id.* at 64.

21. *Id.* at 65.

22. *Id.* at 16.

23. *Id.* at 16, 49, 51.

24. *Id.* at 30, 100.

25. *Id.* at 73.

26. *Id.* at 50.

27. *Id.* at 19.

28. *Id.* at 21, 60.

29. *Id.* at 10.

30. *Id.* at 29.

31. *Id.* at 30-31.

32. *Id.* at 16, 42.

33. *Id.* at 15.

34. *Id.* at 28.

35. *Id.* at 69.

36. *Id.* at 19.

37. *Id.* at 29.

## **An Ethic of Justice (Masculine Moral Perspective)**

Moral dilemma arises from conflict of claims<sup>38</sup>  
Objectified rather than personalized considerations<sup>39</sup>  
Vision that self and other will be treated as having  
equal worth<sup>40</sup>  
Moral imperative is to respect rights, protect from  
interference, preserve autonomy<sup>41</sup>  
Relationships subordinated to rules<sup>42</sup>  
Reliance upon laws, rules and procedures for  
adjudicating conflicts<sup>43</sup>  
Emphasis on hierarchical, conventional logical and linear  
ordering<sup>44</sup>  
Responds categorically<sup>45</sup>  
Narrow vision of success<sup>46</sup>  
Self is separated and individuated, threatened by  
intimacy<sup>47</sup>  
Separates public and private spheres<sup>48</sup>  
Able to focus on issue<sup>49</sup>  
Less likely than women to qualify remarks<sup>50</sup>

In later work, Gilligan and Jane Attanucci hypothesize that Justice and Care are distinguished by conflicting notions of human relationships and differing conceptions of the self in relation to others:

A justice perspective draws attention to problems of inequality and oppression and holds up an ideal of reciprocity and equal respect. A care perspective draws attention to problems of detachment or abandonment and holds up an ideal of attention and response to need. Two moral injunctions—not to treat others unfairly and not to turn away from someone in need—capture these different concerns.<sup>51</sup>

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38. *Id.* at 32.

39. *Id.*

40. *Id.* at 63.

41. *Id.* at 37-38.

42. *Id.*

43. *Id.* at 32.

44. *Id.*

45. *See id.* at 38.

46. *Id.* at 16.

47. *See, e.g., id.* at 8, 12, 42, 155.

48. *Id.* at 154.

49. *Id.* at 160.

50. *Id.* at 161.

51. *See generally* Gilligan & Attanucci, *supra* note 7, at 73.

### B. Feminist Responses to the Care-Justice Dichotomy

The impact of Gilligan and other feminist critics of male-dominant views has been significant for research in numerous disciplines, including cognitive development,<sup>52</sup> ethics and moral philosophy,<sup>53</sup> political theory,<sup>54</sup> science,<sup>55</sup> nursing,<sup>56</sup> and education disciplines.<sup>57</sup> Particularly noteworthy is philosophical theory contrasting an Ethic of Care with an Impartialist conception of morality.<sup>58</sup>

Most philosophy tends to emphasize rights, goals, and duties; it generally reflects a Justice or Impartialist conception of morality. As the name implies, Impartialism requires that the moral agent stand behind what John Rawls calls a "veil of ignorance."<sup>59</sup> Like a statue of Blind Justice holding her scales, or Kant's Universal Lawgiver,<sup>60</sup> a moral agent must repress personal identity, interests, and interpersonal attachments in order to make objective judgments having universal applicability.

An important philosophical exploration of an alternative view is given in Nel Noddings', *Caring: A Feminine Approach to Ethics and Moral Education*.<sup>61</sup> Noddings contrasts the rights and duty-based arguments of Impartialism with the values of a Care-oriented approach.<sup>62</sup> Sympathizing with Gilligan, Noddings rejects a morality that seeks independence from real personal relationships.<sup>63</sup> For Noddings, Caring lies at the very core of moral conception, which she defines as a will to attend to another in multiple ways.<sup>64</sup> Consistent with Gilligan, she sees Care as a typically female way to deal with moral problems:

Women, in particular, seem to approach moral problems by placing themselves as nearly as possible in concrete situations and assuming personal responsibility for the choices to be made. They define themselves in terms of [caring] and work their way through moral problems from the position of one-caring.<sup>65</sup>

52. M. BELENKY, B. CLINCHY, N. GOLDBERGER & J. TARULE, *WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND* (1986) [hereinafter BELENKY & CLINCHY].

53. E. KITTAI & D. MEYERS, *WOMEN AND MORAL THEORY* (1987); N. NODDINGS, *CARING, A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION* (1984).

54. A. M. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* (1988).

55. E. KELLER, *REFLECTIONS ON GENDER AND SCIENCE* (1985).

56. JEAN WATSON, *NURSING: HUMAN SCIENCE AND HUMAN CARE* (1985); JEAN WATSON, *NURSING: THE PHILOSOPHY AND SCIENCE OF CARING* (1985).

57. BELENKY & CLINCHY, *supra* note 52; N. NODDINGS, *supra* note 53.

58. *See generally* N. NODDINGS, *supra* note 53, at 79-103.

59. J. RAWLS, *A THEORY OF JUSTICE* 136-42 (1971).

60. *See* I. KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS IN ETHICAL PHILOSOPHY* (J. Ellington trans. 1983).

61. N. NODDINGS, *supra* note 53.

62. *See id.* at 79-103.

63. *Id.* at 96.

64. *Id.* at 28.

65. *Id.* at 8 (emphasis added).

This disposition to Care, Noddings says, is based upon memories of past caring experiences rooted in nurturing and mutually responsive mother-child relationships.<sup>66</sup>

The values embodied in an Ethic of Care as advocated by Gilligan or Noddings have philosophical supporters and detractors. In support, Marilyn Friedman argues that Care and relationships should be recognized by moral theory.<sup>67</sup> Irrespective of possible origins of a Care ethic in gender, Friedman claims that Gilligan uncovers a philosophical bias that favors Justice-based moral considerations while ignoring others.<sup>68</sup> According to Friedman, the primacy of the Justice perspective in moral disclosure is problematic because in reality, the moral life subsumes justice to special relationships.<sup>69</sup>

Another perspective on Care and Justice may be found in the work of philosophers such as Lawrence Blum who finds Impartialist theories inadequate to account for certain significant personal relationships, life experiences, and social or communal contexts.<sup>70</sup> For example, he suggests that morality within personal relationships—such as parents nurturing their children—is prompted more by a sense of Care than by a relevant order of principles.<sup>71</sup> Yet Blum does not see Care and Impartiality as the only choices; there are many possible ethical voices and perspectives:

I would myself suggest that, even taken together, care and impartiality do not encompass all there is to morality. Other moral phenomena—a random selection might include community, honesty, courage, prudence—while perhaps not constituting full and comprehensive moral orientations, are nevertheless not reducible to (though also not necessarily incompatible with) care and impartiality.<sup>72</sup>

A further perspective on the meaning and relationship of Care and Justice is found in *Women's Ways of Knowing*,<sup>73</sup> which investigated how people learn with emphasis on discovering the process by which women "draw conclusions about truth, knowledge, and authority."<sup>74</sup> Of the five "ways of knowing" identified in their study,<sup>75</sup> two are associated with Care and one with Justice.<sup>76</sup> Categories

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66. *Id.*

67. Friedman, *Care and Context in Moral Reasoning*, in *WOMEN AND MORAL THEORY* 190 (1987).

68. *Id.*

69. *Id.* at 195.

70. Blum, *Gilligan and Kohlberg: Implications for Moral Theory*, 98 *ETHICS* 472 (1988).

71. *Id.* at 477.

72. *Id.* at 483.

73. BELENKY & CLINCHY, *supra* note 52.

74. *Id.* at 3.

75. *See id.* at 23-152.

76. *See generally id.* at 112-52.



relating to Care are labeled Connected Knowing and Constructed Knowledge.<sup>77</sup> When a woman's epistemological frame of reference is Connected Knowing, she sees truth as deriving from personal, rather than external, sources.<sup>78</sup> She learns through empathy, refuses to judge, engages in collaborative explorations, poses questions, and has difficulty arguing, due to sympathy with others' viewpoints.<sup>79</sup> Constructed Knowledge relates to an Ethic of Care in that women following this pattern favor integrated knowledge, tolerate internal contradictions and ambiguities, abandon "either/or" thinking, seek integration between self and understanding, ask questions, listen carefully, and use a language of intimacy to characterize the relationship between themselves and the known.<sup>80</sup> Standing in contrast is the Justice-related category of Separate Knowing, which values objectivism, adversarialism, reasoned critical discourse, rationality, public dialogue, and suppression of self.<sup>81</sup> Separate Knowing, although employed by some women, is aligned more often with men and the Justice perspective.<sup>82</sup>

Among the detractors to Gilligan's work are those who challenge it on methodological and conceptual grounds. Linda Kerber, for example, notes that Gilligan's sample includes only women thereby failing to consider men's responses to similar circumstances.<sup>83</sup> From a historical perspective, Kerber warns that over-simplification and a narrow view of the female orientation may obfuscate woman's social, cultural, historical, and psychological spheres.<sup>84</sup> Kerber also cautions against viewing moral orientations as rooted in biological or psychological stages of maturation.<sup>85</sup> Catherine Grenno and Eleanor Maccoby cite Gilligan for "attacking a straw man"<sup>86</sup> and failing to demonstrate that gender-related differences in attitude correlate with moral development.<sup>87</sup> They recall Lawrence Walker's review of 69 studies assessing moral reasoning by the Kohlberg hypothesis, in which he concludes that for children and adolescents, there are no significant gender-based differences in moral judgment, and for adults, a majority of the studies failed to suggest gender differences in moral development.<sup>88</sup>

Zella Luria faults Professor Gilligan's methodology, noting that the scoring system is unclear and the nature of the evidence is vague, or the data is sometimes

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77. See generally *id.*

78. *Id.* at 112-13.

79. See generally *id.* at 112-23.

80. See generally *id.* at 131-52.

81. See generally *id.* at 103-12.

82. See, e.g., *id.* at 101, 103, 104, 107.

83. Kerber, *Some Cautionary Words for Historians*, 11 *SIGNS* 304, 305 (1986).

84. *Id.* at 309.

85. See generally *id.* at 305, 308, 309-10.

86. Grenno & Maccoby, *How Different is the Different Voice?*, 11 *SIGNS* 310, 312 (1986). But see Gilligan, *Reply by Carol Gilligan*, 11 *SIGNS* 324 (1986).

87. See generally Grenno & Maccoby, *supra* note 86, at 310-16.

88. See generally Walker, *Sex Differences in the Development of Moral Reasoning: A Critical Review*, 55 *CHILD DEV.* 677, 688 (1984).

overinterpreted.<sup>89</sup> Katherine Hayles questions Gilligan's explanation of George Eliot's *The Mill on the Floss*, a narrative to which Gilligan frequently returns in her book, asserting that "Eliot's understanding of the limitations inherent in the female ethic of care is much more complex than Gilligan apparently realizes."<sup>90</sup> The main limitation Hayles sees is that feminine anger becomes suppressed in the face of "an oppressive system of male dominance."<sup>91</sup>

### C. *Feminist Legal Scholarship and Moral Orientations*

Although it takes many forms, feminist jurisprudence primarily addresses women's lack of social power and inferior position before the law. Janet Rifkin, for example, characterizes law as "a symbol and a vehicle of male authority"<sup>92</sup> based on early conceptions of women as "male property" and patriarchal premises contained in civil culture.<sup>93</sup> With the emergence of capitalist society, she claims, notions of law and justice became ideological mechanisms which perpetuated a patriarchal social order that extends down to the present time.<sup>94</sup>

Some feminist legal scholarship finds Gilligan's Care and Justice distinction useful in the analysis of law and legal culture. For example, Linda Krieger applies Gilligan's premise that women and men differ in their forms of ethical judgment<sup>95</sup> to a critique of the prevalent Justice-based "liberal view of equality"<sup>96</sup> which she identifies as an ethic of rights deriving from male moral psychology.<sup>97</sup> Krieger suggests that emerging ethical sensibilities within the legal community have the potential to shift the jurisprudential paradigm to a more "incorporationist" approach, or Caring and feminine ethic that would alter the way "equality" is understood by law.<sup>98</sup> An "incorporationist" approach, she notes, would recall Wolgast's proposal for equal employment opportunities and special rights, including pregnancy disability leave.<sup>99</sup>

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89. Luria, *A Methodological Critique*, 11 SIGNS 316, 316, 318-19 (1986).

90. Hayles, *Anger in Different Voices: Carol Gilligan and The Mill on the Floss*, 12 SIGNS 23, 24 (1986).

91. *Id.* at 34.

92. Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83, 84 (1980).

93. *Id.* at 89.

94. *Id.* at 92-95.

95. Krieger, *Through a Glass Darkly: Paradigms of Equality and the Search For a Woman's Jurisprudence*, 2 HYPATIA 45, 49 (1987).

96. *Id.* at 51.

97. *Id.* at 57.

98. *Id.* at 57-58.

99. *Id.* at 56-57. A question unanswered by Krieger's analysis is whether similar jurisprudence theories can be laid at the doors of male and female moral psychology. Does a woman's sense of injustice about certain laws and her ability to observe anomalies in the prevailing jurisprudential paradigm derive from her Caring ethic, her sense of relatedness to others, and contextual ways of knowing? Or, does she simply recognize its underlying contradiction and unfairness? Does gender psychology factor into only certain types of jurisprudential paradigm shifts—namely those that might most affect women? Or can other constructs mentioned, such as "rejection of 'the separate but equal'

Other feminist legal scholars have challenged uncritical applications of Caring theory to legal scholarship. Deborah Rhode cautions that buying into one perspective of feminist research might obscure a possible diversity of views and "risk perpetuating a homogenized view of women's identity and a reductive analysis of women's interests."<sup>100</sup> Catherine MacKinnon goes much further; she faults Gilligan for affirming gender differences in moral orientation as capacities women should nurture.<sup>101</sup> MacKinnon considers female values and virtues as unfortunate products of male domination: "Women value care because men have valued us according to the care we give them . . . [Perhaps] women think in relational terms because our existence is defined in relation to men."<sup>102</sup>

MacKinnon prefers to analyze gender-based issues in terms of Difference and Dominance.<sup>103</sup> The legal implication of the Difference approach is that women's problems require judgments and solutions different from those for men. Criticizing the Difference approach, MacKinnon recalls that in affirming woman's uniqueness, Gilligan "achieves for moral reasoning what the special protection rule achieves in law. . . . For women to affirm difference, when difference means dominance, as it does with gender, means to affirm the qualities and characteristics of powerlessness."<sup>104</sup>

The Dominance approach assumes that sexual inequality has origins in male political supremacy and argues that women can only obtain equal legal, social, and political power by employing the same methods males have used.<sup>105</sup> In a similar vein, Epstein criticizes the dichotomous reasoning underlying claims of gender difference in moral orientation.<sup>106</sup> She concludes that inequalities between males and females are socially constructed perceptions which perpetuate a destructive gender inequality in legal control and public policy.<sup>107</sup>

On the other hand, Carrie Menkel-Meadow sees a more positive side to female values.<sup>108</sup> She speculates about the legal system women would create if left to their own devices.<sup>109</sup> An effect might be to alter "the harshness of win/lose results"<sup>110</sup> by more active participation in settlement processes; less confrontation, more cooperative and conversational approaches to advocacy; less hierarchical managerial practices; better integration of personal and professional

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paradigm," be explained as having origin in a feminine ethic of Care or a male ethic of Justice? *Id.* at 49.

100. Rhode, *The "Woman's Point of View,"* 38 J. LEGAL EDUC. 39, 41 (1988).

101. C. MACKINNON, *FEMINISM UNMODIFIED* 38-39 (1987).

102. *Id.* at 39.

103. *See generally id.* at 32-45.

104. C. MACKINNON, *supra* note 101, at 38-39.

105. *Id.*

106. C. EPSTEIN, *DECEPTIVE DISTINCTIONS: SEX, GENDER, AND THE SOCIAL ORDER* 72-98 (1988).

107. *Id.* at 81-83.

108. *See* Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985).

109. *Id.* at 52.

110. *Id.*

lives; more awareness of client needs; broadened concepts of relevance and evidence; judges paying attention to mercy; less emphasis on individualistic and private rights; and more attention to "inclusion, connection, collectivity and social responsibility."<sup>111</sup> Menkel-Meadow suggests this would also lead to a new constitutional orientation that would give greater weight to feminine concerns for connection and shared responsibility.<sup>112</sup> Kenneth Karst also legitimates the Care perspective, arguing that constitutional doctrine which defines basic liberties in a Justice-oriented framework of non-interference, individualism, and separation is overly narrow and exclusionary of the moral world view of women.<sup>113</sup> He advocates constitutional reform that would accommodate women's moral perceptions, including concern for interdependence, cooperation, and care.<sup>114</sup>

While Gilligan's moral development theory has had a marked impact on such domains as legal theory, feminist jurisprudence, and critiques of legal practice, empirical research applying Gilligan's Care and Justice framework to the actual experience of lawyers has been limited. Weiss and Melling interviewed twenty women of the 1987 class at Yale Law School.<sup>115</sup> Although the authors reviewed and were influenced by Gilligan's work<sup>116</sup> there is no indication that the interview protocol or content analysis was derived from Gilligan's conceptual interview.

More recently, Jack and Jack interviewed thirty-six attorneys (18 men and 18 women) for evidence of Gilligan's Care and Justice moral orientation in perceived ethical values and experiences.<sup>117</sup> The coding manual used by Jack and Jack to identify rights (or Justice) and Care reasoning in the interview data was based upon Gilligan's theory and coding systems.<sup>118</sup> Consistent with Gilligan's thesis, the study found that more than three-fourths of men favored a Rights perspective,<sup>119</sup> or closely identified their personal value systems with professional role expectations such as the requirements of the code of ethics and institutionalized standards of professional responsibility.<sup>120</sup> Half of women interviewed identified with Care<sup>121</sup> in the sense that they recognize the discrepancy between professional and personal morality as a source of personal tension.<sup>122</sup>

111. *Id.* at 61.

112. *Id.*

113. See Karst, *Woman's Constitution*, 3 DUKE L.J. 447, 480 (1984).

114. *Id.* at 507.

115. Weiss & Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1310 (1988).

116. See *id.* at 1302-08.

117. See Jack & Jack, *Women Lawyers: Archetype and Alternatives*, in MAPPING THE MORAL DOMAIN 263 (1988).

118. *Id.* at 263-64.

119. *Id.* at 188.

120. *Id.* at 54-55.

121. *Id.* at 188.

122. *Id.* at 54-55.

Hill explores the relevance of Gilligan's theory to alternative methods of dispute resolution.<sup>123</sup> She describes the Competitive approach to negotiation as emphasizing competition, adversarialism,<sup>124</sup> and "measuring success in terms of beating the other."<sup>125</sup> According to Hill, the Competitive approach denies recognition of the female perspective or Care orientation identified by Gilligan.<sup>126</sup> The Cooperative approach, on the other hand, stresses communication and relationships, and is presented as a dispute resolution method that, more than the Competitive approach, conforms to the experience and moral orientation of women.<sup>127</sup>

Craver empirically considers the impact of gender on negotiated outcomes in a study of law student clinical negotiation exercises.<sup>128</sup> Although he postulated that there would be no significant difference in negotiating achievement of male and female students, Craver acknowledges common gendered stereotypes that males are more aggressive and competitive than females<sup>129</sup> and speculates that such perceptions might create the impression that women are less effective in negotiation settings.<sup>130</sup> Yet his research findings show no significant gender difference in the average negotiating achievement of students participating in fifteen Legal Negotiation classes.<sup>131</sup>

#### D. Negotiating Styles and Negotiation Ethics

##### 1. Prototypical Styles of Negotiation

The post-World War II literature on bargaining and negotiation demonstrates how investigators with widely varying intellectual perspectives can nourish each others' work. Nearly every social, scientific, and professional discipline in American higher education now has something to say about human conflict, why it arises, and how participants seek to manage it. One of the few generalities that can be drawn is that the two variables which most consistently control the behavior of negotiators are personal predisposition and negotiation context.

On the contextual side, Thomas Schelling distinguishes between what he calls the "efficiency" aspects of bargaining and its "distributional" aspects--the first pertaining to situations characterized by the possibility of joint gain, and the

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123. See generally Hill, *Alternative Dispute Resolution in a Feminine Voice*, 5 OHIO ST. J. DISP. RESOL. 337, 363-70 (1990).

124. *Id.* at 371-72.

125. *Id.* For a discussion of Competitive and Cooperative negotiation styles, see *infra* notes 136-38 and accompanying text.

126. Hill, *supra* note 123, at 371.

127. *Id.* at 372-73.

128. Craver, *The Impact of Gender on Clinical Negotiating Achievement*, 6 OHIO ST. J. DISP. RESOL. 1 (1990).

129. *Id.* at 5.

130. *Id.* at 9.

131. *Id.* at 12-13, 16-17.

second by the onetime distribution of a fixed resource, where more for one party inevitably means less for the other.<sup>132</sup> Richard Walton and Robert McKersie see this reflected behaviorally as a difference between what they call "distributive" and "integrative" bargaining in the labor context.<sup>133</sup> They argue that the parties' actions will be determined in part by whether they perceive the negotiation context as one which compels the slicing of a fixed pie or instead presents the potential for pie enlargement prior to division.<sup>134</sup>

Our concern in this article, however, is primarily with the predisposition side of the equation; that is, those factors in the genetic formulation, enculturation, socialization, professional training, and life experience of attorneys which may cause them to adopt a given style of negotiation. Otomar Bartos posits ethnicity, nationality, age, and gender as important determinants in this regard.<sup>135</sup> In *The Social Psychology of Bargaining and Negotiation*,<sup>136</sup> Jeffrey Rubin and Bert Brown behaviorally distinguish Cooperative from Competitive bargainers in their discussion of the research literature.<sup>137</sup> Williams and his colleagues have empirically discovered the operation of two primary negotiating patterns among attorneys also identified as Cooperative and Competitive, in a context that allows comparisons to be made between the reported behavior of attorneys who are considered effective in each pattern and those who are not.<sup>138</sup> Rubin and Brown find significant a dimension they define as "interpersonal orientation," which is the degree to which negotiators, whether operating in a Cooperative or Competitive mode, are either influenced by or indifferent to how they are being treated by other negotiators.<sup>139</sup>

In 1981, Roger Fisher and William Ury synthesized much of this earlier work, including Charles Osgood's system for graduated reciprocation in tension,<sup>140</sup> the Walton-McKersie integrative bargaining model, and Rubin and Brown's interpersonally oriented, cooperative bargaining approach, into a four-step process they call "principled negotiation."<sup>141</sup> The distributive, competitive behavior at the opposite end of the negotiation spectrum became for them "positional bargaining."<sup>142</sup>

Carrie Menkel-Meadow analyzed legal negotiation in terms of two conceptual models: a traditional adversarial model and a more cooperative or integrative

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132. T. SCHELLING, *THE STRATEGY OF CONFLICT* 21-22 (1960).

133. R. WALTON & R. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS* 4-5, 11-45, 126-37 (1965).

134. *Id.*

135. O. BARTOS, *SIMPLE MODELS OF GROUP BEHAVIOR* 47-56 (1967).

136. J. RUBIN & B. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION* (1975).

137. *Id.* at 32-39.

138. G. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 18-54 (1983).

139. J. RUBIN & B. BROWN, *supra* note 136, at 159.

140. *See* C. OSGOOD, *AN ALTERNATIVE TO WAR OR SURRENDER* (1962).

141. R. FISHER & W. URY, *GETTING TO YES* 11 (1983).

142. *Id.* at 12.

problem-solving model.<sup>143</sup> Each has its own characteristic structure, processes, and assumptions. The adversarial model is largely descriptive of the competitive practices of many lawyers.<sup>144</sup> The problem solving model, which seeks to take the needs of all parties into account, goes beyond description to prescribe ways to make problem solving more conscious and effective as a method of negotiating.<sup>145</sup> Interestingly, Menkel-Meadow acknowledges that her problem-solving model reflects values identified by Carol Gilligan with female modes of focusing on the needs of all parties in situations of conflict.<sup>146</sup>

In 1986, David Lax and James Sebenius drew upon the work of Howard Raiffa<sup>147</sup> and others to enrich the Cooperative-Competitive distinction with the concepts of "value creating" and "value claiming" negotiation behavior.<sup>148</sup> This negotiation behavior is based in part on the positive-sum versus zero-sum nature of negotiation contexts, and also on the collective skills of negotiators in avoiding the destructive behaviors which all too often exemplify distributive, competitive bargaining.<sup>149</sup> At the same time, however, they criticize as overly simplistic the positional bargaining/principled negotiation dichotomy of Fisher and Ury's brief practical negotiation manual.<sup>150</sup> For Lax and Sebenius, the effective negotiator should have the insight and versatility to recognize that all negotiations have distributive aspects and to know when and how to use either value-creating or value-claiming technique while trying to mitigate relationship-destructive aspects.<sup>151</sup>

Finally, in *Getting Disputes Resolved*,<sup>152</sup> a creatively process-oriented view of negotiation, William Ury, Jeanne Brett, and Stephen Goldberg assert that parties in conflict see the situation and behave in three possible ways: to maintain interests, to assert rights, or to exercise power.<sup>153</sup> They find the negotiation process itself can be oriented primarily around the assertion of rights, power, or interests, with interest-based negotiation being most closely allied with the cooperative, integrative, principled, problem-solving, value-creating end of the negotiation spectrum.<sup>154</sup> The rights or power-based region is oriented toward the competitive, positional, distributive, value-claiming end.<sup>155</sup> In the same year, Roger Fisher and Scott Brown made a further contribution to interest-based

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143. Menkel-Meadow, *Toward Another View of Negotiation: The Structure of Legal Problem Solving*, 31 UCLA L. REV. 754, 755-57 (1984).

144. *Id.* at 764-65.

145. *Id.* at 794-95.

146. *Id.* at 162.

147. HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982).

148. D. LAX & J. SEBENIUS, *THE MANAGER AS NEGOTIATOR* 32-33 (1986).

149. *Id.*

150. *Id.* at 225.

151. *Id.*

152. W. URY, J. BRETT & S. GOLDBERG, *GETTING DISPUTES RESOLVED* (1988).

153. *Id.* at 169-73.

154. *Id.*

155. *Id.*

bargaining, focusing specifically on the relationship aspects of negotiation and the importance of what they call "unconditionally constructive" negotiating strategies such as rationality, reliability, and non-coercive influence.<sup>156</sup>

## 2. Negotiation Ethics

Before attempting to weave into one coherent tapestry the strands of feminist jurisprudence, professional ethics, and negotiating styles, the final step is to consider the ethical aspects of negotiation practice. The role of norms or context-specific standards of bargaining behavior in given conflict situations has been investigated in various socio-legal and anthropological settings by Schelling,<sup>157</sup> Bartos,<sup>158</sup> P. H. Gulliver,<sup>159</sup> Laura Nader and Harry Todd,<sup>160</sup> and others. Williams, England, Farmer and Blumenthal discussed the implications of lawyers' ethical codes for the negotiation practices at the bar.<sup>161</sup> In their law school text on negotiation, Harry Edwards and James White devote the entire closing chapter to ethical considerations for the legal negotiator.<sup>162</sup> They stop short, however, of positing a code of negotiation ethics, and instead close with a list of ethical issues and problems of which the negotiator should be mindful.<sup>163</sup>

In 1980, White forcefully asserted his opposition to the negotiation ethics proposed in Rule 4.2 of the draft American Bar Association Model Rules of Professional Conduct.<sup>164</sup> His reasons for opposing this move include problems with specificity, consistency, and what he saw as unwarranted constraints on the ability of advocates to intentionally mislead opposing counsel regarding certain aspects of a dispute being negotiated.<sup>165</sup>

The tone and flavor of White's position stands in graphic contrast to Robert Gordon, who believes that attorneys should be held to the same standards of fairness and honesty in negotiation as they are in trial practice<sup>166</sup> and Walter Steele, who argues that the declining status of the legal profession is due in no small part to an inability of the bar to agree upon and embrace even minimal ethical standards for negotiation process.<sup>167</sup> To Lloyd Burton, behaviors such

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156. R. FISHER & S. BROWN, *GETTING TOGETHER* 38 (1988).

157. T. SCHELLING, *supra* note 132.

158. O. BARTOS, *supra* note 135.

159. P. GULLIVER, *DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE* (1979).

160. L. NADER & H. TODD, *THE DISPUTING PROCESS LAW IN TEN SOCIETIES* (1978).

161. Williams, England, Farmer, & Blumenthal, *Effectiveness in Legal Negotiation*, in H. EDWARDS & J. WHITE, *THE LAWYER AS A NEGOTIATOR* 8, 15-18 (1977).

162. H. EDWARDS & J. WHITE, *supra* note 161, at 339-62.

163. *Id.*

164. White, *supra* note 1, at 926.

165. *Id.*

166. Gordon, *Private Settlement as Alternative Adjudication: A Rationale for Negotiation Ethics*, 18 J.L. REFORM 503, 504 (1985).

167. Steele, *Deceptive Negotiating and High-Toned Morality*, 30 VAND. L. REV. 1387, 1387 (1986).



as deception and intimidation in negotiation are "ethically charged" because some negotiators consider them unethical while others do not.<sup>168</sup> His work deals specifically with situations in which negotiators come from more than one field of professional training and have widely varying perspectives on the ethical appropriateness of certain bargaining behaviors.<sup>169</sup>

While Fisher and Ury do not explicitly assert that their model of "principled negotiation" is ethically superior to traditional "positional bargaining," by using the word "principled" to distinguish their method, they certainly imply that non-conforming behavior is unprincipled, which suggests unethical as well.<sup>170</sup> The inference was not lost on James White. In a 1984 review of Fisher and Ury's book, White attacks what he sees as the "naive, occasionally self-righteous" position the authors take in advising against bargaining behaviors such as threats and intentionally misleading opposing parties.<sup>171</sup> While not making a specific claim of ethical or moral superiority, Roger Fisher did respond to White's assault on *Getting to Yes* by distinguishing his work from White's on the basis that "White is more concerned with the way the world is, and I am more concerned with what intelligent people *ought to do*."<sup>172</sup>

As illustrated in the foregoing review of the literature on legal negotiation, there is a striking tendency for experts to conceptualize negotiation in terms of two competing styles or processes. The dichotomy appears under an impressive multiplicity of labels: zero-sum vs. non-zero-sum (Schelling),<sup>173</sup> integrative vs. distributive (Walton and McKersie),<sup>174</sup> cooperative vs. competitive (Rubin and Brown),<sup>175</sup> Williams,<sup>176</sup> Gifford;<sup>177</sup> principled vs. positional (Fisher and Ury),<sup>178</sup> adversarial vs. problem solving (Menkel-Meadow);<sup>179</sup> value-creating vs. value-claiming (Lax and Sebenius),<sup>180</sup> and interest-based vs. rights-based (Ury, Brett, and Goldberg).<sup>181</sup> As we will demonstrate below, the ethics literature is remarkable in the sense that both poles of these competing models of negotiation are assumed to embody acceptable norms of negotiation behavior and to satisfy minimum ethical requirements. There is a strong underlying ethical

168. See Burton, *Ethical Discontinuities in Public-Private Sector Negotiation*, 9 J. POL'Y ANALYSIS & MGMT. 23 (1990).

169. *Id.*

170. R. FISHER & W. URY, *supra* note 141.

171. White, *The Pros and Cons of "Getting to Yes"*, 34 J. LEGAL EDUC. 115, 115 (1984).

172. Fisher, Comment, 34 J. LEGAL EDUC. 118, 120 (1984) (emphasis added). Roger Fisher's response to White's review appeared in the same issue immediately following White's review.

173. T. SHELLING, *supra* note 132.

174. R. WALTON & R. MCKERSIE, *supra* note 133.

175. J. RUBIN & B. BROWN, *supra* note 136.

176. G. WILLIAMS, *supra* note 138.

177. G. GIFFORD, *LEGAL NEGOTIATION: THEORY AND APPLICATIONS* (1989); Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41 (1985)

178. R. FISHER & W. URY, *supra* note 141.

179. Menkel-Meadow, *supra* note 143.

180. D. LAX & J. SEBENIUS, *supra* note 148.

181. W. URY, J. BRETT & S. GOLDBERG, *supra* note 152.

tension between proponents of competing models, as depicted in the well-known Roger Fisher and James White debate,<sup>182</sup> but commentators stop short of condemning as unethical the approaches with which they disagree.

Are competitive bargaining behaviors inherently less ethical than "principled" or "cooperative" behaviors? Is the competitive bargainer by definition less ethical in conducting negotiations than her or his cooperative counterpart? The better view, based on the model of the feminist legal thought reviewed above, is that cooperative and competitive negotiators have legitimate but differing moral perspectives on the means and ends of the negotiation process.

### 3. Negotiation Hypotheses

A striking characteristic of the literature on negotiation behavior is the persistent tendency to interpret negotiation behavior in terms of variations on two basic models, cooperation and competition, to fear that one (cooperation) is weaker but possibly morally superior, but ultimately to conclude that both models are ethically satisfactory. There is an intriguing parallel in the feminist literature: moral development is discussed in terms of two dominant models as in Gilligan's two modes of moral reasoning,<sup>183</sup> Noddings's conception of the Ethic of Care versus the Ethic of Justice,<sup>184</sup> and Belenky's ways of knowing.<sup>185</sup> There is a fear that one (Care) is weaker, and a fear the other (Justice) may reflect a need for dominance and power, yet ultimately both models are morally acceptable. There is one striking difference, however, between the two bodies of literature. In legal ethics, the morality of a more dominant or power-driven model (competition) is a subject of continuing debate, while in the literature on moral development, the morality of an Ethic of Justice, is held above reproach.

These parallels between Care-Justice and Cooperation-Competition bring us to the question that led the authors to collaborate on this article: Is there possibly a correlation between Care and Cooperation, on one hand, and Justice and Competition, on the other? Could it be, for example, that Competitive negotiators and theorists are acting in compliance with Gilligan's Ethic of Justice paradigm, while Cooperatives are giving voice to her Ethic of Care? Viewed from this perspective, for example, it may be that Competitive negotiators are motivated by the same ethical impulses that Kohlberg associates with exemplary moral development,<sup>186</sup> suggesting they feel an ethical imperative as well as a strategic advantage in couching disputes in terms of rights and power rather than

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182. See, e.g., WHITE, *supra* note 171.

183. C. GILLIGAN, *supra* note 2, at 19.

184. N. NODDINGS, *supra* note 53, at 8.

185. BELENKY & CLINCHY, *supra* note 52, at 102.

186. L. KOHLBERG, *The Current Formulation of the Theory*, in *ESSAYS ON MORAL DEVELOPMENT* 229 (1984).

"interests"<sup>187</sup> (to use Ury, Brett, and Goldberg's construct) and in pressing for unilateral advantage rather than genuinely consensual solutions.

It may be that Cooperative, problem-solving, integrative, unconditionally constructive, "principled" negotiators are more attuned to relationships among the parties, more conscious of the community, and animated by an underlying sense of Care, as contrasted with their more Competitive opposites, who are instead more concerned with case-by-case strategic advantage for their clients. The former may see in the law the potential for individual and social transformation, while the latter will see--and use--the law as sword and shield for the assertion and defense of individual rights.

Those who study or practice negotiation for a living are acutely aware that neither the world nor their own personalities are quite so simple as the Competitive or Cooperative labels imply. Most, by virtue of professional inculcations and life experiences, carry aspects of the Cooperative and the Competitive, the Communitarian and the Libertarian, the Care-giver and the Rights-enforcer. This much is true even without considerations of possible gender-based variations.

The tug-of-war between these divergent Cooperative and Competitive perspectives is, for many, as much a matter of internal dialogue as external debate. It is important to add that both male and female attorneys in the interview research discussed below portray themselves as deeply influenced in practice by Ethic of Care principles. The fact that many females practice Competitive negotiation casts doubt on the assertion that these values and behaviors are either inherently male or female or mutually exclusive.

Finally in concluding this literature review, it should be noted that the authors of this paper do not agree about whether negotiation ethics should be written and enforced among lawyers. The disagreement can be explained in part in the views of Lon Fuller, who observed that it is much easier to define and sanction the bad than to describe and compel the good.<sup>188</sup> However, the strongest argument against a code of negotiation ethics is fear that cooperative negotiators would feel bound to comply with it (indeed, empirical evidence suggests that they are highly ethical in negotiation even in the absence of a written code)<sup>189</sup> and would let down their guard on the assumption that competitive negotiators were also complying with similar rigor. This false sense of security could be very costly to their clients. We conclude that the advisability of codifying negotiation ethics for lawyers remains an open question.

In the broader legal community, one view is that we can and should establish an ethical "floor" below which legal negotiators must not descend. The other view is that we are currently developing such a floor, as evidenced in part by the sort of dialogue embodied in this article, and that it will be a more stable base if constructed by voluntary effort rather than by attempts to enforce formal standards.

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187. *Id.* at 307.

188. L. FULLER, *THE MORALITY OF LAW* (1964).

189. G. WILLIAMS, *supra* note 138, at 27.

## *E. Economic Theory*

### 1. Economic Signalling Literature

Economic theory, when coupled with feminist theory and empirical studies documenting gender stereotyping, may provide additional insights into the negotiation behavior of practicing attorneys. Legal disputes arise under conditions of uncertainty. Economists have attempted to analyze the legal dispute resolution process by considering how parties to a transaction can reduce this uncertainty. Generally in economic studies the uncertainty is characterized by the assumption that one party to a transaction has private information which is unavailable to the other party, although some studies have allowed each party to have private information.<sup>190</sup> The analysis then focuses on the degree to which this private information is communicated to the other party and whether the resulting outcome would have been different if both parties had full information. Akerloff provided the first clear explanation of how private, or incomplete, information can make some desirable bargaining outcomes unattainable.<sup>191</sup> In his example, the presence of poor quality goods causes high quality goods to be withdrawn from the market.<sup>192</sup>

Spence suggested that there were bargaining outcomes in which high quality goods would remain in the market and command higher prices, but only if the sellers of high quality goods were able to "signal" the true quality of the goods to

190. Myerson, *Two-Person Bargaining Problems with Incomplete Information*, 52 *ECONOMETRICA* 461, 461-62 (1984).

191. Akerloff, *The Market for Lemons: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970). Our analysis is based on Akerloff's article and is similar to that found in some intermediate microeconomics texts.

192. Consider the used car market. The seller of the car has information about the quality of the car which is unavailable to the potential purchaser. If better quality cars sell for higher prices, then the seller of a poor quality car has an incentive to "lie" and claim that the car is higher quality than it actually is. The buyer recognizes this and adjusts his offer downward. For example, assume there are two types of used cars: "lemons" and "quality" cars. "Quality" cars are worth \$300, but "lemons" are worth only \$100. If the purchaser believes that any car for sale is equally likely to be "quality" or a "lemon," the purchaser is willing to pay up to \$200 for the car.

Assuming that any car for sale is equally likely to be a quality car or a lemon, the buyer's valuation is obtained by equally weighting the two prices:  $[\$100 \times (.50)] + [\$300 \times (.50)] = \$200$ . The seller of the car, however, has private information about the true quality of the car, and is not willing to sell a "quality" car, worth \$300 for only \$200. Therefore, if the prevailing price is \$200, only "lemons" will be available for sale. The buyer knows that there are only two types of cars and that sellers of "quality" cars will not sell for \$200, so the buyer lowers his bid to \$100. At a price of \$100, all the "lemons" are sold, but no "quality" cars are offered for sale. The presence of private information causes all "quality" cars to be withdrawn from the market.

Since there is an active used car market, there must be some way for sellers of used cars to credibly convey their private information and convince potential purchasers of the true quality of the cars.

potential purchasers.<sup>193</sup> The signal will only be effective, or believed by the uninformed party to the transaction, if it is too costly for the low quality sellers to mimic the high quality sellers.<sup>194</sup>

When the party with the private information provides an appropriate or convincing signal, the underlying model is a signalling model. The signal may be volunteered by the informed party, or sought out by the uninformed party. If the uninformed party elicits the private information by offering the informed party alternatives designed so that parties with different information make different choices, the model is a screening model. The alternative chosen reveals the private information to the uninformed party.<sup>195</sup>

If the legal profession is perceived as male-dominated and justice-oriented, and if the private practice of law is the epitome of this culture, a hypothesis based on economic screening theory predicts that law firms will attract justice-oriented attorneys by offering terms and conditions<sup>196</sup> which will be accepted only by lawyers having the desired male and justice-oriented traits. Men and women who are less strongly committed to these values will accept jobs elsewhere, perhaps with state or federal agencies where work conditions are less severe.<sup>197</sup> Consequently, studies such as the present one, which focus primarily on lawyers in private practice, may be unable to discriminate between the Care and Justice hypotheses precisely because the caring attorneys have been screened out of the sample at a much earlier date.

193. Spence, *Job Market Signaling*, 87 Q.J. ECON. 355, 357 (1973). For example, the seller of a high quality car may agree to pay for all repairs during the year following the sale, or to provide a warranty. If it is too costly for sellers of low quality goods to provide the same warranty, then the buyer can infer the true quality of the good from the type of warranty offered. The warranty serves as a signal of quality. Cooper & Ross, *Product Warranties and Double Moral Hazard*, 16 RAND J. ECON. 103, 105 (1985); see Grossman, *The Role of Warranties and Private Disclosure About Product Quality*, 24 J.L. & ECON. 461, 470 (1981).

194. Riley, *Informational Equilibrium*, 47 ECONOMETRICA 331, 331 (1979); Spence, *supra* note 193, at 358.

195. For example, insurance companies cannot tell if a newly insured party is a high risk or a low risk individual. If insurance is priced at actuarially fair rates then only high risk individuals will purchase insurance. Insurance companies know this and offer policies with varying coverage at different prices. The policies are designed to ensure that high and low risk individuals choose different policies which are priced to reflect the true risk level. For example, life insurance policies which pay even if death is by suicide require a substantially higher annual premium than those policies which cover only natural or accidental death. The insurance company, the uninformed party, screens applicants by offering different policies, and insurance purchasers, the informed parties, convey their true risk level to the insurance company by the policy they choose. See generally D. KREPS, *A COURSE IN MICROECONOMIC THEORY* 577-719 (1990).

196. In the language of the bargaining literature, the uninformed party will offer a contract designed to be accepted only by informed parties of the appropriate type. In the insurance example, purchasers of insurance are high risk or low risk types. In the used car example, the types of cars are quality cars or lemons.

197. If high grades or heavy extra-curricular involvements are justice oriented, it may follow that this selection process occurs in law schools as well. Caring young attorneys in law school may choose to spend more time on family or service activities rather than law school activities such as law review or moot court which major law firms typically require.

## 2. Economic Signalling Hypotheses

Whether or not Gilligan is correct in concluding women are generally more caring than men, there is a perception in American culture that, to be successful, women must adapt to the male norm.<sup>198</sup> Women in non-traditional occupations must overcome gender stereotypes which portray women as less effective because they are less aggressive or less authoritative.<sup>199</sup> Women are faced with the daunting task of overcoming these stereotypes. This may require behavior which exaggerates their allegiance to male norms because studies show that people have a tendency to interpret behavior differently depending on whether it is performed by a man or woman.<sup>200</sup> In the workplace, these interpretations tend to go in

198. C. GILLIGAN, *supra* note 2, at 10 ("the male model is the better one since it fits the requirements for modern corporate success . . . . [G]iven the realities of adult life, if a girl does not want to be left dependent on men, she will have to learn to play like a boy."); D. TANNEN, *YOU JUST DON'T UNDERSTAND* 235-44 (1990). "[S]tyles more typical of men are generally evaluated more positively and taken as the norm . . . . [W]hen women and men are in groups together, the very games they play are more likely to be men's games than women's." *Id.* at 235. "If [women] speak in ways expected of women, they are seen as inadequate leaders. If they speak in ways expected of leaders they are seen as inadequate women." *Id.* at 244.; see also Basow & Silberg, *Student Evaluations of College Professors: Are Males Prejudiced Against Women Professors?*, 79 J. EDUC. PSYCHOLOGY 308, 308 (1987) ("for female professors, 'masculinity' scores were better predictors [of overall teaching effectiveness as rated by students] than were 'femininity' scores."). These perceptions were also documented in the interviews reported below. See *infra* pp. 48-50.

199. C. GILLIGAN, *supra* note 2, at 17; D. TANNEN, *supra* note 198, at 224-44; Basow & Silberg, *supra* note 198, at 313 (consistent devaluation of women on dynamism and confidence which connote dominance and authority. This devaluation was greater in non-traditional fields); Bennett, *Student Perceptions of and Expectations for Male and Female Instructors: Evidence Relating to the Question of Gender Bias in Teaching Evaluation*, 74 J. EDUC. PSYCHOLOGY 170, 174 (1982).

[I]f her students are to accept her intellectual authority and judgment . . . , it is doubly important for a female instructor to be seen as compelling, self-assured, and professional in instructional approach . . . . [W]omen not perceived as especially charismatic, experienced, and professional in instructional style are unlikely to be accepted as offering authoritatively balanced instruction.

*Id.*; Martin, *Power and Authority in the Classroom: Sexist Stereotypes in Teaching Evaluations*, 9 SIGNS 482, 486-87 (1981).

[M]any women faculty must deal with the incongruity between student sex-role expectations and traditional images of power and authority. . . . 'I feel as if I cannot win in the classroom. If I'm organized and professional students perceive me as cold and rejecting. If I'm open and responsive and warm, I seem to be challenged and taken advantage of, perhaps considered not quite as bright.'"

*Id.* (quoting Winkler, *Sexism in the Classroom* 7 (paper delivered at the American Sociological Association Meeting, New York, September 1976)); Sidanius & Crane, *Job Evaluation and Gender: The Case of University Faculty*, 19 J. APPLIED SOC. PSYCHOLOGY 174, 187 (1989) ("It was hypothesized that female faculty in non-traditional roles . . . would be perceived as less competent than their male counterparts. Although this interaction effect was found to be statistically significant, the pattern of competency ratings . . . was much more complicated than expected.").

200. D. TANNEN, *supra* note 198, at 229-34 (silence in men is power, silence in women is evidence of lack of power); Bradley, *The Folk-Linguistics of Women's Speech: An Empirical Examination*, 48 COMM. MONOGRAPHS 73, 85-87 (1981) (women who used tag questions were judged to be less knowledgeable than men who used them); Condry & Condry, *Sex Differences: A Study of*

favor of men and against women. For women, this creates a double bind. For example, women are generally expected to be more caring than men,<sup>201</sup> and professional women are frequently judged harshly for failing to meet this gender-based expectation of care.<sup>202</sup> Previous studies have suggested that a professional woman must "choose between coming across as a strong leader or a good woman,"<sup>203</sup> with successful professionals choosing to emulate their strong male counterparts. Therefore, non-Care may serve as a signal of strength and care as a signal of weakness.

Under the assumption that law is presently a male-dominated profession, this analysis in conjunction with economic signalling theory provides several possible hypotheses. First, women who are practicing law may already have been screened or self-selected so that they are no more caring, or possess the same general attributes, as their male competition. There is some indirect empirical evidence for this hypothesis.<sup>204</sup> Second, independent of whether female attorneys are generally as caring as male attorneys, in order to be perceived as "successful" in their male-dominated profession and to protect themselves from gender-based stereotyping, female attorneys will behave in ways seemingly inconsistent with the Care hypothesis to signal the strength of their skills and positions. Unfortunately, these two hypotheses are observationally equivalent, so our data cannot discriminate between them. If female attorneys successfully signal strength by adopting

*the Eye of the Beholder*, 47 CHILD DEV. 812, 814 (1976) (crying baby boy was angry, crying baby girl was afraid); Newcombe & Amkoff, *Effects of Speech Style and Sex of Speaker on Person Perception*, 37 J. PERSONALITY & SOC. PSYCHOLOGY 1293, 1301 (1979) (women perceived as using more tag questions in controlled study where men and women used equal number of tag questions).

201. D. TANNEN, *supra* note 198, at 241; Bennett, *supra* note 199, at 177 ("Despite their higher level of contact with their female instructors, students did not report that female instructors are more available. . . . This perception of unavailability may more accurately reflect the demands on female instructors' time."); Martin, *supra* note 199, at 483 ("It is clear that women faculty are more likely to spend significantly more time and effort on teaching and committee work, while men are more likely to spend more time on research and administration."); Wall & Barry, *Student Expectations for Male and Female Instructor Behavior*, in *WOMEN IN HIGHER EDUCATION: TRADITIONS AND REVOLUTIONS* (R. Cheatham ed. 1985).

202. C. GILLIGAN, *supra* note 2, at 15; D. TANNEN, *supra* note 198, at 239-41; Basow & Silberg, *supra* note 198, at 311-14; Bennett, *supra* note 199, at 177 ("[F]emale instructors give more time and personal attention but are more closely judged than are male instructors for conforming or not conforming to the role of supportive advisor."); Sidanius & Crane, *supra* note 199, at 176 ("[W]e have stereotypes about jobs as a function of gender. . . . [T]ypically people respond more favorably to individuals whose behaviors correspond with prevailing stereotypes.").

203. D. TANNEN, *supra* note 198, at 251. "If a man appears forceful, logical, direct, masterful, and powerful, he enhances his value as a man. If a woman appears forceful, logical, direct, masterful, or powerful, she risks undercutting her value as a woman." *Id.* at 241; *see also* C. GILLIGAN, *supra* note 2, at 14.

204. Sidanius & Crane, *supra* note 199, at 192.

[I]t is also possible that for women to be accepted in very male-dominated roles, they will in fact have to be much more competent than their male counterparts and that the higher perceived competency of these women is not simply a function of perceptual distortion but rather due to the fact that they *really are* more competent.

*Id.* (emphasis in original).

the male justice-oriented norm, then they will be perceived as being at least as justice-oriented as their male colleagues. If female attorneys successfully signal strength by adopting aggressive behavior, as suggested some empirical studies,<sup>205</sup> then they will be perceived as being less caring and more aggressive than their male counterparts. Third, if female attorneys do in fact signal their relative types by taking actions which are inconsistent with the Care hypothesis, they will be perceived as at least as aggressive as their male counterparts because they are expected to act in non-aggressive caring ways which are consistent with the hypothesis.<sup>206</sup> Finally, women behaving in ways inconsistent with the Care hypothesis will be rated least favorably on Care attributes by people who believe in the Care hypothesis more strongly or who expect it in women and are disappointed not to find it, whether or not they value care in themselves. For example, if women believe that women should behave in ways consistent with the care hypothesis, then women would tend to rate other women who behaved inconsistently with the hypothesis more harshly on Care attributes than would men. The converse is also true. If men generally believe in the Care hypothesis or harbor gender-based stereotypes more strongly than women, men would tend to give poorer ratings to women acting inconsistently with the Care hypothesis.<sup>207</sup>

### 3. Repeated Play and Reputation

The signalling models previously discussed all implicitly assume that the parties only interact with each other once, so there is no opportunity for credible verbal communication or learning. But, if one party repeatedly engages in similar transactions or disputes, and consistently responds in the same manner, it may be possible for that party to develop a "reputation."<sup>208</sup> A reputation is valuable because it signals information and can, consequently, influence the behavior of the

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205. See *supra* notes 199-202 and accompanying text.

206. See *supra* notes 200-02 and accompanying text.

207. The authors of this article disagree about whether women or men are more likely to accept the Care hypothesis in general. There is limited empirical evidence for either proposition. Basow & Silberg found a "consistent devaluation of female professors by male students," but also documented instances when females rated female instructors more harshly. Baslow & Silberg, *supra* note 198, at 311-12. They found that engineering and economics/business students showed the greatest bias against female professors and argued that students in these male-dominated fields had less experience with professional women and may have had more traditional attitudes toward women. *Id.* at 313. "Male students may show more of a bias [against female instructors] than do female students because males are more traditional than females in terms of attitudes toward women, and traditional attitudes toward women are associated with more prejudicial attitudes." *Id.* at 15.

208. See generally Fudenberg & Kreps, *Reputation in the Simultaneous Play of Multiple Opponents*, 54 REV. ECON. STUD. 541 (1987); Kreps, Milgrom, Roberts & Wilson, *Rational Cooperation in the Finitely Repeated Prisoners' Dilemma*, 27 J. ECON. THEORY 245 (1982); Kreps & Wilson, *Reputation and Imperfect Information*, 27 J. ECON. THEORY 253 (1982).



other party to the transaction.<sup>209</sup> For Example, a manufacturer that consistently produces only high quality brand name goods will develop a reputation for quality. If the manufacturer then produces new products of uncertain quality, it benefits from brand name loyalty. However, a significant instance of cheating, such as producing low quality goods for one season, will destroy the manufacturer's reputation and cause the loss of the price premium previously associated with its reputation for high quality goods.<sup>210</sup>

Selton analyzed the optimal response for a chain-store with one store in each of several cities to the threat of a potential entry of a competitor into one of the cities.<sup>211</sup> If a competitor decided to put a store in any one city, the chain-store would lose some business, but not enough to justify a fight to prevent the competitor's entrance into the market. However, other competitors, seeing that the chain-store was "weak" and would not fight entry into its markets, would feel safe in opening competing stores in other cities. Taken together, these new entrants would constitute a serious threat to the chain-store's profitability. Even though it is optimal in the short-run for the chain-store to ignore the first competitor, it should consider the incentives this "weak" response creates in future potential entrants. Consequently, the chain-store is forced to adopt the "tough" strategy of fighting all entrants to acquire a "tough" reputation. Once this reputation is acquired, no potential entrant is willing to risk the fight associated with entering any of the chain-store's markets. However, if at any time the chain store fails to fight any entry, its reputation for "toughness" is damaged and the barrier to entry is lowered.

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209. See Milgrom & Roberts, *Predation, Reputation and Entry Deterrence*, 27 J. ECON. THEORY 280 (1982); Rosenthal, *Games of Perfect Information, Predatory Pricing and the Chain-store Paradox*, 25 J. ECON. THEORY 92 (1981); Selton, *The Chain-Store Paradox*, 9 THEORY & DECISION 127 (1978).

210. Reconsider the "lemons" car example discussed in notes 192-93 and accompanying text. To simplify the analysis, assume that car manufacturers can choose to make lemons or quality cars and that consumers cannot distinguish between quality cars and lemons until after the car has been purchased and driven for a while. As before, only low quality cars will be produced and the market-clearing price will be \$100 ruling out the use of a warranty to signal the car's true quality. But car manufacturers make many cars and, presumably, intend to run their companies profitably for many years. Therefore, the car manufacturers have an incentive to announce that they will always produce high quality cars and sell them at the market price. If a manufacturer consistently produces high quality cars for several years in a row, the company will develop a reputation for manufacturing high quality cars and the price of that company's cars will rise to reflect its true value. The consumer, based on the company's reputation, is now willing to pay \$300 for the car. However, the consumer's willingness to pay the premium price based on the manufacturer's reputation is critically dependent upon the manufacturer consistently producing high quality cars period after period. This analysis based on Selton's pioneering article, is similar to that found in most intermediate microeconomics texts. Technically, equilibrium requires that the subgame either be played an infinite number of times or that there be a positive probability that the players will play the game again. Rosenthal, *supra* note 209, at 97, 99; Selton, *supra* note 209, at 133.

211. Selton, *supra* note 209, at 133.

#### 4. Reputation Hypothesis

Synthesizing reputation analysis with gender-based expectations and sex-type stereotyping suggests that female attorneys may consistently behave in ways inconsistent with the Care hypothesis in order to establish a reputation for being "successful." If, as Gilligan<sup>212</sup> and other literature suggest,<sup>213</sup> women are not perceived as successful unless they adopt the male norm and are at least as aggressive, then a female attorney may consistently act aggressively to establish a reputation as being able to hold her own against the aggressive males in the profession. To the extent that women are expected to act consistently with the Care hypothesis, this consistently inconsistent behavior may lead to successful female professionals having reputations for toughness, aggressiveness, or arrogance.<sup>214</sup>

The value of a reputation is that it initially conveys credible information to the parties to a transaction and no additional time or resources need be expended to reestablish that information. A "successful" reputation is arguably more valuable or important to a woman in a non-traditional field because it saves her the resource expenditures necessary to overcome gender-based expectations by repeatedly signalling that she conforms to the male norm or is as aggressive or competent as her male counterpart. This analysis suggests that female attorneys may be more concerned about their reputation among her colleagues than male attorneys. The teaching evaluation literature offers some limited support for this proposition.<sup>215</sup> Tenured female faculty and women who had received teaching awards were devalued less by students than were women without these indicia of success.<sup>216</sup> Tenure and teaching awards help establish a teacher's reputation and signal quality.

Just as the chain-store could not allow even one competitor to enter in any market, a female attorney who is inherently caring may be unwilling to risk acting in a caring manner even after having been in practice for many years. A significant deviation from behavior consistent with her reputation may lower the

212. C. GILLIGAN, *supra* note 2, at 17.

213. See *supra* notes 198-204 and accompanying text.

214. D. TANNEN, *supra* note 198, at 239-40. "[W]omen who attempt to adjust their styles by speaking louder, longer, and with more self-assertion will also better fit the model of masculinity. They may command more attention and be more respected, but they may also be disliked and disparaged as aggressive and unfeminine." *Id.* If a woman doesn't engage in womanly behavior she may be perceived as arrogant. See *id.*; Wall & Barry, *supra* note 201, at 288 (successful frequently connotes aggressive).

215. Basow & Silberg, *supra* note 198, at 313-14 (evidence suggesting female professors may be judged more strongly than are male professors on the basis of background variables); Bennett, *supra* note 199, at 175 ("[F]avorable perceptual judgments are more consequential for women than for men when the question of acceptance of the content of instructional presentation is at issue. Second, students are less tolerant of what they see as a lack of formal "professionalism" in the conduct of teaching from their female instructors."); Sidanius & Crane, *supra* note 199, at 176 ("the salience of gender is greater in the absence of other information and is therefore more likely to affect judgments").

216. Basow & Silberg, *supra* note 198, at 313.

barriers against challenging it and force her to repeatedly incur the costs of overcoming gender-based expectations and proving she can successfully compete in her male-dominated, justice-oriented profession. This implies that female attorneys would not become more caring over time. However, since it arguably takes less effort to maintain a reputation than to establish one, it may be that in cross-sectional data, more mature female professionals are willing to show some care and are perceived as less "tough" or less aggressive than women just establishing themselves in the profession. The limited number of observations on female attorneys in the survey analyzed here makes detailed analysis of these hypotheses difficult.

### III. RESEARCH FINDINGS

This Part discusses the results of two studies of negotiation behavior and ethical beliefs among practicing lawyers and considers their meaning in light of feminist and legal negotiation theory. The data for the first study were collected as part of a 1986 survey of the negotiation practices of lawyers in Phoenix, Arizona. The data for other study were obtained through personal interviews of Colorado attorneys in 1989.

#### A. *Phoenix II Survey Data*

The data reported in this section were collected in a 1986 study of the negotiating characteristics of attorneys in Phoenix, Arizona, as part of a larger research project by two of the authors and two colleagues.<sup>217</sup> This study, referred to as Phoenix II,<sup>218</sup> was designed to obtain empirically valid descriptions of the negotiating behavior of practicing attorneys and to identify effective negotiating characteristics.

In the Phoenix II Study, a questionnaire was mailed to a randomly selected sample of 1,000 attorneys in the Phoenix metropolitan area. They were asked to recall their most recently concluded legal matter that involved significant negotiating contact with an opposing attorney, to briefly describe the subject matter of the negotiation, and to record their perceptions of the other attorney by assigning a numerical rating on 144 characteristics relevant to negotiation, including a rating for effectiveness in negotiation. They also provided information

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217. The researchers and a preliminary description of the larger research project is given in Williams, England, Farmer, & Blumenthal, *supra* note 161.

218. This study is identified as Phoenix II since a similar survey was conducted of Phoenix lawyers in 1976. In the 1976 study, a questionnaire was mailed to a randomly selected sample of 1,000 attorneys in the Phoenix metropolitan area. A total of 351 attorneys completed and returned questionnaires. Due to the comparatively small number of women practicing law in 1976, only 3% of the responding attorneys were female, and only 1% of the negotiators described in the questionnaires were female (three attorneys). These numbers were so small that no conclusions could be drawn about female legal negotiators apart from the observation that none of them were rated as ineffective negotiators.

about the outcome of the negotiation. Two hundred thirty-three completed survey forms were returned, each providing data on a different negotiation.

The Phoenix II data contain ratings on the negotiation performance of 27 female (12% of the sample)<sup>219</sup> and 206 male negotiators; 35 of the attorneys responding to the survey were female (15% of the sample). The gender distribution of responding and rated attorneys is given in Table 1.

TABLE 1. GENDER OF RESPONDENT AND RATED NEGOTIATORS

Gender of Respondents	Gender of Rated Negotiators	
	Male	Female
Male	174	21
Female	30	5
Not Indicated <sup>220</sup>	2	1
Totals	206	27

This section reports our reanalysis of the data from the Phoenix II study<sup>221</sup> to specifically test the Care/Justice hypothesis and to look for other possible gender effects in legal negotiation.

219. This proportion of women correctly reflects the relative number of female practitioners in the Phoenix Bar in 1986.

220. Three of the returned surveys failed to supply gender information about the responding attorney.

221. Initial analyses of the Phoenix II data were carried out to identify negotiation approaches or styles and to discover what negotiating strategies and behaviors were associated with ratings of "effective," "average," and "ineffective" among legal negotiators. A cluster analysis was used to group attorneys with similar negotiation patterns. One reason for this approach was to determine whether they would group into Cooperative and Competitive categories similar to those resulting from two earlier studies in which the same researchers used Q-Factor methodology to discover that negotiators divided into two distinct groupings, plus a small residual who did not fit in either category. The attorneys in the first group were basically Cooperative in their approach to negotiation. Attorneys in the second group are basically Competitive. The Cooperative and Competitive patterns identified in this way have been elaborated in the work of Gifford, *see sources cited supra* note 177. A full discussion and interpretation of the cooperative-competitive groups is given in G. WILLIAMS, *supra* note 138, at 15-54, 137-39.

## 1. Analysis of the Care Hypotheses

Based on Gilligan's construct of women's moral development, we hypothesized that female lawyers would be rated higher on attributes of Care in the Phoenix II survey than male lawyers.

To test this hypothesis, we prepared a summary of the descriptors used by Gilligan,<sup>222</sup> Noddings,<sup>223</sup> Dickey,<sup>224</sup> and Belenky,<sup>225</sup> to define the two moral orientations of Care and Justice.<sup>226</sup> We then used this list to review the 144 items contained in the Phoenix II survey instrument, and identified from them fourteen items which best reflect qualities associated with Care, such as adaptable, communicative, helpful, patient, sympathetic, avoided inflicting harm, considered my needs, etc., and nine items which similarly reflect qualities associated with Justice. The fourteen Care items are listed in Table 2 below.<sup>227</sup> To determine whether there were significant female/male differences on Care, we then returned to the Phoenix II data and statistically compared the mean ratings of female and male negotiators on the fourteen Care items using a one-way analysis of variance that adjusted for experience by covarying "years of practice."<sup>228</sup> Results are shown in Table 2 below.

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222. C. GILLIGAN, *supra* note 2.

223. N. NODDINGS, *supra* note 53.

224. B. Dickey, *Gilligan Revisited: Methodological Issues in the Study of Gender and Moral Development*, ERIC Document ED 295275, 8-12.

225. BELENKY & CLINCHY, *supra* note 52.

226. This produced a master list of 132 sentences or phrases, 74 of them describing Care and 58 describing Justice.

227. Although these fourteen items are consistent with an Ethic of Care, the 144 items in the original questionnaire were intended for a different purpose and are only marginally suited for the difficult task of identifying Caring behavior in legal negotiators.

228. Female attorneys in the sample tended to have fewer years in practice than the male attorneys. Male attorneys averaged 13.9 years of practice, while female attorneys averaged only 6.7 years of practice. The mean comparison between male and female attorneys was adjusted by using "years in practice" as a covariate. The results of the mean comparisons after adjusting for the covariate were essentially identical to the unadjusted results.

**TABLE 2. RATINGS OF MALE AND FEMALE LAWYERS ON THE CARE RELATED VARIABLES**

Mean Ratings by Gender of Rated Negotiators		
Care Variables	Male	Female
Adaptable	2.74	2.08*
Argumentative	2.42	3.15*
Communicative	3.02	2.88
Dominant	2.39	2.33
Helpful	2.63	2.46
Patient	2.73	2.42
Quarrelsome	1.71	2.13
Sympathetic	2.13	1.79
Avoided-Did not avoid inflicting harm	3.42	3.88
Considered-did not consider my needs	3.83	4.88*
Emotional-logical	4.45	4.19
Probed-disinterested in my position	3.46	4.00
Refused-willing to move position	4.47	3.71*
Maintaining a good relation with you	2.19	1.62

\* There is no significant difference between the ratings for male and female negotiators on each item, except on the four items marked with an asterisk; these differences are statistically significant at the .05 level.

Ratings of male and female negotiators were quite similar, differing on only four of the fourteen Care variables. More problematically, the four differences were all in the direction of male lawyers being rated as more, rather than less Care-oriented than female lawyers. Thus, male lawyers were rated as more adaptable, less argumentative, more considerate of the needs of the opposing lawyer, and more willing to move from their positions than female lawyers. This result is inconsistent with our hypothesis that females will be more influenced by an ethic of Care than males.

As a further test of the Care hypothesis, rated negotiators were divided into High Care and Low Care groups using a cluster analysis on the fourteen Care variables. Based on the Care hypothesis, one would expect proportionately more

female lawyers to cluster into the High Care group and more male lawyers to cluster in the Low Care group.

**TABLE 3. CARE GROUPS DERIVED FROM CLUSTER ANALYSIS OF CARE VARIABLES**

Care Groups	Gender of Rated Negotiators	
	Male	Female
High Care	128 (66%)	12 (55%)
Low Care	65 (34%)	10 (45%)

In Table 3, male and female lawyers clustered into the two Care groups in approximately equal proportions. In fact, the proportion of male lawyers in the High Care group turned out to be slightly higher than the proportion of female lawyers in that group. The differences in proportions of male and female attorneys across Care groups do not appear to be statistically significant.<sup>229</sup> In addition to clustering in similar proportions on the Care variables, male and female lawyers in each group also had basically similar rating patterns on all but a few of the 144 variables in the survey.

## 2. Analysis of the Justice Hypotheses

Based on Kohlberg's theory of moral development<sup>230</sup> and the feminist critiques asserting it is more reflective of male than female experience, we hypothesized that male lawyers, having been socialized to analyze situations based on "rights" and "justice", would be rated higher on justice attributes in the Phoenix II survey than female lawyers.

To test this hypothesis, following the procedure described in the preceding section,<sup>231</sup> we identified nine items from the original questionnaire that best reflect qualities associated with Justice, such as analytical, fair-minded, objective,

229. A chi-square test was performed setting the expected frequencies of female High Care and Low Care attorneys equal to the actual observed frequencies of male High Care and Low Care attorneys. This yielded a non-significant chi-square value of 1.89. Although using observed male frequencies introduces problems of choice-based and biases the results towards a finding of no significant difference, the small sample size for female attorneys and the lack of theoretical predictions for the relative proportions prevented the use of alternative tests.

230. See sources cited *supra* note 13.

231. See *supra* notes 222-29 and accompanying text.

organizing, rational, realistic, and self-controlled. A complete listing of the items is given in Table 4. We then compared the mean ratings of male and female attorneys on these nine items using a one-way analysis of variance that adjusted for experience by covarying "years of practice."<sup>232</sup>

**TABLE 4. RATINGS OF MALE AND FEMALE LAWYERS ON JUSTICE RELATED VARIABLES**

Mean Ratings by Gender of Rated Negotiators		
Justice Variables	Male	Female
Analytical	2.92	2.77
Fair-minded	2.86	2.12*
Objective	2.70	2.38
Organizing	2.64	2.42
Rational	3.31	2.96
Realistic	3.24	2.71*
Self-controlled	3.49	3.32
Careful-Not careful about the timing of his or her actions	3.71	4.00
Reasonable-Unreasonable	3.19	3.83

\* There is no significant difference between the ratings for male and female negotiators on each item, except on the two items marked with an asterisk; these differences are statistically significant at the .05 level.

As can be observed in Table 4, the data provide only modest support for this hypothesis. The ratings of male negotiators on all of the Justice variables consistently tended in the direction a greater Justice orientation, but only two of the nine differences were statistically significant. In those two comparisons, male lawyers were rated as more "fair-minded" and more "realistic" than the female lawyers. While these two differences were statistically significant, the actual magnitude of the differences between the ratings for male and females is not large. Thus, it is reasonable to conclude that there is no Justice-related difference in the ratings of female and male attorneys or, at best, the result of the analysis of the Justice variables lends only modest support to the hypothesis that males are more Justice-oriented than females.

As a further test the Justice hypothesis, rated negotiators were divided into High Justice and Low Justice groups using a cluster analysis on the nine Justice variables. If the Justice hypothesis is correct, one would expect proportionately

232. See *supra* note 228 for further discussion of the experience variable.



more male lawyers to cluster into the High Justice group and more female lawyers to cluster in the Low Justice group.

**TABLE 5. JUSTICE GROUPS DERIVED FROM CLUSTER ANALYSIS OF THE JUSTICE VARIABLES**

Justice Groups	Gender of Rated Negotiators	
	Male	Female
High Justice	134 (69%)	13 (57%)
Low Justice	61 (31%)	10 (43%)

In Table 5, male lawyers clustered into the High Justice group in a slightly higher proportion than female lawyers. While this gives some support to the hypothesis of a greater justice orientation for male lawyers, it should not escape notice that a substantial number of female lawyers clustered into the High Justice group (57%). Proportionately, nearly as many female lawyers were clustered into the High Justice group as male lawyers. The differences in proportions are not statistically significant.<sup>233</sup> Given the small differences in mean ratings and proportions between the two groups, one must conclude that these results do not provide strong support for the Justice hypothesis.

The two analyses described above point to a conclusion that male and female negotiators in this sample were not perceived to differ on either Care- or Justice-related attributes. Also the data as analyzed do not provide support for either hypothesis as applied to lawyers in the negotiation context. An alternative explanation for the finding of no significant differences in Care and Justice-related attributes between genders is based on the screening and self-selection theories discussed earlier. It may be that women who are more caring choose not to enter law school or the private practice of law and are therefore not represented in our data. In this case, female attorneys practicing law would not be expected to be any different on Care or Justice attributes than their male colleagues.

The Phoenix II questionnaire was not designed to measure Care or Justice, and it is fair to suppose that comparisons of Care and Justice orientations might

233. A chi-square test using the actual observed frequencies of male High Justice and Low Justice attorneys as expected frequencies for female attorneys. The test showed not statistical difference. The chi-square value was 1.85. See *supra* note 229 for a discussion of the motivation for this test.

have been more interesting, and possibly discriminating, if the study had originally been geared to test these hypotheses.

### 3. Effectiveness Ratings of the Care and Justice Groups

The Phoenix II research was originally designed to obtain data on attorney negotiating behavior and effectiveness, not the dimensions of Care or Justice. In this section, we use effectiveness ratings contained in the data to compare the negotiating effectiveness of male and female attorneys in the High-Low Care and High-Low Justice groupings. These comparisons, listed in Tables 6a and 6b below, provided some of the most important findings in the study.

**TABLE 6a. HIGH AND LOW CARE GROUPS BY NEGOTIATING EFFECTIVENESS**

Negotiating Effectiveness of Each Group	Gender of Rated Negotiators		
	Male	Female	Significance
High Care	6.02	5.58	NS
Low Care	4.01	3.30	NS

\* Total number of rated attorneys was 207. The mean difference in effectiveness between High Care and Low Care groups was more than two points on a nine-point scale. A one-way analysis of variance shows this difference is significant at the .01 level. The smaller differences between male and female attorneys at each level, while favoring males, were found in a one-way analysis of variance to be insignificant.

Table 6a shows two important comparisons. The first is the difference in negotiating effectiveness between High Care and Low Care attorneys. For female as well as male groupings, High Care attorneys are rated as significantly more effective as negotiators than their Low Care counterparts. This finding runs counter to the hypothesis that female or male attorneys who are Caring will be perceived as weak. The second compares the comparative negotiating effectiveness of males and females in both groups. Although the numerical effectiveness ratings for males appears slightly higher than for females, a one-way analysis of variance shows there is no difference in negotiating effectiveness between males and females in either group.

**TABLE 6b. HIGH AND LOW JUSTICE GROUPS BY NEGOTIATING EFFECTIVENESS**

Negotiating Effectiveness of Each Group	Gender of Rated Negotiators		
	Male	Female	Significance
High Justice	6.03	5.61	NS
Low Justice	3.86	3.00	NS

\* Total number of rated attorneys = 207. In this Table, the mean difference in negotiating effectiveness between High Justice and Low Justice groups is more than two points on a nine-point scale. According to the one-way analysis of variance, this difference is significant at the .01 level. The differences in effectiveness ratings between males and females was not significant according to a one-way analysis of variance.

Not surprisingly, we find in Table 6a that male and female High Justice negotiators have significantly higher effectiveness ratings than their Low Justice counterparts. In comparing the effectiveness scores of male and female attorneys, we found that although female ratings appear slightly lower than male, statistically there is no difference between them.

In summary, then, Tables 6a and 6b provide three of our most significant findings. First, High Care attorneys, regardless of gender, were rated as significantly more effective as negotiators than Low Care. Second, High Justice attorneys were rated as significantly more effective than Low Justice attorneys. Judging from these statistics, among lawyers, Care and Justice are both rated as positive qualities in the sense that both are directly related to negotiator effectiveness. Third, and most importantly for evaluating the Care/Justice hypotheses and concerns about gender stereotyping, there were no significant differences in effectiveness ratings between male and female attorneys in any of the four groups.

These results suggest that Care, at least in the dimensions measured by our analysis, is not identified with weakness or ineffectiveness in legal negotiations. To this extent, it is probably not necessary for female lawyers to signal non-Care to be considered effective in negotiation. This is further supported by our finding of a strong correlation between Care and the rating female negotiators received on the word "feminine" in the survey. Although this research was not designed to specifically test the signalling hypotheses, and therefore should not be considered the last word on the subject, it is fair to say the findings run counter to the

hypothesis that female attorneys should signal "non-care" to be perceived as effective in negotiation.

Another unexpected result is the high proportion of attorneys who clustered into the High category in both Care and Justice: 66% of the males and 55% of the females were High Care; 69% of the males and 57% of the females were High Justice. Especially for males (69% and 66%), but also for females (55% and 57%), it is evident that Care and Justice as measured in this analysis are not mutually exclusive categories, but rather are overlapping. About 35% of the male attorneys and 13% of the female obtained High ratings in both Care and Justice. Given that High ratings on Care and Justice are both correlated with greater effectiveness, attorneys who receive low effectiveness ratings may be able to improve their perceived negotiating effectiveness by learning to exhibit more Care and Justice qualities.

#### 4. Other Empirical Observations

Because our finding that female attorneys did not receive higher ratings on Care-related items than male attorneys runs counter to our initial hypotheses, we developed and tested a number of alternative hypotheses. One obvious possibility is gender bias. For example, 21 of the 27 women in our study were rated by male opponents: would the results have been different if all of the female attorneys had been rated by women? There are several reasons why this might be expected. For example, male attorneys might be more influenced by gender-based stereotypes, or male attorneys might expect female attorneys to be more caring and rate women more harshly if these expectations are not met. Or since communications are clearer when conversations are among people of the same gender,<sup>234</sup> perhaps male attorneys fail to understand or to perceive care in female opponents.

To test the impact of gender mix on the findings, we partitioned the data into four groups, based on sex of the rater and sex of the attorney being rated,<sup>235</sup> then used a one-way analysis of variance to compare the results. This test indicated that little or no bias was introduced by the gender mix of rating and rated attorneys.<sup>236</sup>

Interestingly, the greatest differences in ratings occurred when female attorneys were rating female attorneys; the ratings tended to be harsher than when males were rating females or when females were rating males. With a significance level of five percent, female attorneys were rated as being more concerned

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234. See D. TANNEN, *supra* note 198, at 235-44.

235. The four groups were: females rating females, females rating males, males rating females, and males rating males.

236. Mean ratings of male attorneys were generally the same regardless of whether the rating attorney was female or male. There were significant differences on only three out of 144 items (stern, dignified, and praising). The same was true for ratings of female lawyers; male attorneys rated women significantly differently than their male colleagues on two out of 144 items (spineless, timid). These differences were significant at the .05 level.

with reputation, less obliging, less praising, less adaptable, and more concerned about out maneuvering the other attorney in the transaction.

Based on this partitioning of the data set, we concluded that the failure to find evidence supporting an Ethic of Care or Justice was not due to the preponderance of male raters in the sample. Our finding that, to the extent there were significant differences in evaluations, women tended to rate women more harshly is consistent with other literature,<sup>237</sup> and could reflect disappointed expectations if female attorneys expect other female attorneys to feel free to behave in a more caring manner since they are dealing among "women." The evidence suggesting sex-role stereotyping was so limited that it is unlikely that this perceptual bias is introducing a bias into our results.

An interesting empirical result of the study is that the feminine rating of female attorneys appeared to be sensitive both to the actions taken by the female attorney and to the perceptions of the rater. This result is supported by the variability observed in the ratings of female attorneys across Care group on both the words "masculine" and "feminine" in the survey. The feminine rating of female attorneys in the Low Care group was much lower than the feminine rating given to female attorneys in the high care group. Correspondingly, the masculine rating of female attorneys in the low care group was much higher than the masculine rating given to female attorneys in the High Care group. By contrast, as can be seen in Table 7, the masculine rating appears to be fairly constant for male attorneys across Care groups, and insensitive to either attorney actions or rater perceptions.

TABLE 7. MEAN RATINGS OF MALE AND FEMALE ATTORNEYS ON THE FEMININE AND MASCULINE VARIABLES ACROSS CARE GROUPS

Gender of Rated Attorney	Mean Ratings			
	Low Care		High Care	
	Male	Female	Male	Female
Feminine	.32	1.80	.18	3.66
Masculine	3.13	1.90	3.44	.91

237. See Basow & Silberg, *supra* note 198, at 311-12 (documenting instances of female students rating female professors more harshly than male students).

### 5. Reputation Results

Reputation theory, when coupled with assumptions about gender-based stereotyping or signalling, predicts that female attorneys will be more concerned with establishing and protecting their reputations than their male colleagues. In other words, reputation may be more valuable to a female attorney. As noted in the foregoing discussions, the empirical findings are generally inconsistent with either gender-based stereotyping or the hypothesis that female attorneys need to overcome perceptions of weakness due to Care or femininity. However, there is strong evidence in the data suggesting that female attorneys are perceived as more concerned about reputation than their male colleagues. Lawyers responding to the Phoenix II survey rated negotiators on the degree to which opposing negotiators showed concern about their reputations with the bar, with their own firm, and with the rating attorney. When mean ratings on these variables were compared across gender, female attorneys were found to be significantly more concerned about their reputations on two of these three items: their reputations with the bar and with their own firms.<sup>238</sup>

TABLE 8. MEAN REPUTATION RATING BY GENDER

Rated Attribute	Mean Rating on Reputation	
	Male	Female
Reputation with bar	1.66	2.62*
Reputation with firm	1.85	3.00*
Reputation with rating attorney	1.49	1.42

\* The differences between the mean ratings on the two asterisked items were significant at the .01 level. These ratings were made on a 1 to 5 scale.

The perceived concern for reputation by female attorneys does not appear to be an artifact of the larger number of male attorneys rating female attorneys in the data. Male attorneys did rate female attorneys substantially higher on concern for reputation, both with the bar and with firm, but female attorneys also found female attorneys to be more concerned about reputation. Male and female attorneys received statistically indistinguishable ratings on the third item, concern for reputation with the other attorney in the negotiation, independent of which gender did the rating.

238. Male and female attorneys appeared to be equally unconcerned about their reputations with the other attorney in the negotiation.

**Table 9. REPUTATION RATINGS BY GENDER OF RESPONDENT AND RATED NEGOTIATORS**

Respondent Rated Attorney	Male Male	Male Female	Female Male	Female Female
Reputation in Firm	1.83	3.20	1.96	2.40
Reputation with Bar	1.64	2.55	1.80	3.00

Reputation theory also predicts that female attorneys will conscientiously seek to protect their reputations, once established, since this saves them the cost of reestablishing the reputational information. To test this prediction, observations on attorneys in the sample were divided according to years of experience in the practice of law. Attorneys in general, and female attorneys in particular, would be expected to be more concerned with establishing a reputation during their first few years in practice. However, once a reputation is established, female attorneys may be expected to remain more concerned with reputation than males, in order to ensure that their negotiation reputation is not damaged.

Using four years of experience as the dividing line, female attorneys were partitioned into experienced and inexperienced groups. The mean rankings on concern for reputation with the bar were statistically indistinguishable for the experienced and inexperienced female attorneys.<sup>239</sup> Male attorneys who had practiced for more than four years were less concerned about their reputation with the bar. Inexperienced male attorneys received mean ratings comparable to female attorneys on concern for reputation with the bar. On average, experienced female attorneys remain about as concerned with reputation as inexperienced male attorneys.

Although the empirical analysis leaves unanswered the question of why reputation may be more valuable to female attorneys, the data clearly show that female attorneys are perceived to be more concerned about their reputations with the bar and with the firm than are male attorneys. While male attorneys may have to establish a reputation during their first few years in practice, thereafter they are perceived as significantly less concerned with reputation. Female attorneys, by contrast, are consistently perceived as being concerned with reputation independent of how long they have been in practice. If this result is due solely to perceptions of concern by the raters rather than by actual concern for reputation by female

239. The difference in mean ratings for experienced and inexperienced male attorneys was statistically significant at the .05 level. However, there were only thirteen male attorneys in the inexperienced group. Data limitations prevent an analysis on less than four years of experience even though a reputation may be established earlier.

negotiating attorneys, the perception is held equally by male and female attorneys and remains to be explained.

## 6. Relationship between Patterns of Cooperation-Competition and Care-Justice

The final hypothesis in relation to the Phoenix II data relates back to the idea that originally motivated the present paper. Based on informal comparisons of the bodies of literature reviewed in this article, the authors had an initial impression there may be a meaningful correspondence between concept of Care as developed in feminist moral and legal theory and the behavior of Cooperative negotiators as reported in Williams.<sup>240</sup>

The original analysis of the Phoenix II data established the presence of two distinct negotiating patterns, one Cooperative and the other Competitive.<sup>241</sup> Of the 207 practicing attorneys rated in the survey, 138 (67%) were found to be Cooperative and the remaining 69 (33%) were Competitive. The next step was to list each of the 207 individual attorneys and determine their place in each of the three classifications to be compared: Cooperative or Competitive; High or Low Care; and High or Low Justice. Finally, a comparison was made between members of the High-Low Care groups and the Cooperative-Competitive groups, and a comparison between High-Low Justice groups and the Cooperative-Competitive groups. The results are tabulated in Tables 10 and 11.

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240. G. WILLIAMS, *supra* note 138, at 15-54, 137-39, (also listed for reference in Appendix A below).

241. In the Phoenix II study, the cooperative and competitive patterns were obtained follows: as in the Phoenix I research, G. WILLIAMS, *supra* note 138, at 15-54, we sought a statistical method for analyzing the data that could not be pre-conditioned by the researchers to find any particular kind of result. In Phoenix I, a Q-analysis was used to produce the patterns. However, the Q-analysis is not well known, it requires a significant amount of hand checking, and it is not supported in current versions of the major statistical packages such as SPSS. Our solution was to analyze the individual ratings of all 233 negotiators on all 144 survey items using the Quick Cluster Procedure provided in SPSS/PC+ Advanced Statistics, Version 3.0, specifying only that the analysis should divide the sample into two different groups. This procedure is recommended for use with large data files such as ours; it is able to produce only one solution for the number of clusters suggested, which in our case was two. Use of this improved method for analyzing large data files helps to confirm the robustness of the cooperative and competitive categories as the most relevant for the negotiation context, because the two groups produced by the cluster analysis have an extremely close correspondence with the cooperative and competitive groups previously discussed. There is not room within this paper to discuss the full results and implications of this analysis, so we will limit our discussion to the comparison of Cooperative-Competitive groups with the High and Low Care and Justice groups. These data are reported in Tables 10 and 11.



**TABLE 10. COMPARISON OF GROUP ASSIGNMENTS BETWEEN THE HIGH AND LOW CARE AND THE COOPERATIVE-COMPETITIVE GROUPS**

Gender of Rated Attorney	Attorneys in Group		
	High Care	Low Care	N*
Cooperative	127 (95%)	11 (15%)	138
Competitive	7 (5%)	62 (85%)	69

\* Total number of rated attorneys is 207.

As shown in the left column of Table 10, 95% of the attorneys in the High Care group were in the Cooperative group of negotiators discovered in the earlier study; the remaining 5% were in the Competitive group. To say the same thing from the point of view of Cooperation, of the 138 Cooperative negotiators identified in the Phoenix II study, 127 were in the High Care group, while 11 were in the Low Care. As to the Low Care category, only 15% were Cooperative negotiators, while 85% were Competitive. Repeating this in terms of Competitive negotiators, of the 69 Competitive negotiators identified in the Phoenix II study, 62 were in the Low Care group, while only 7 were in the High Care. We find, then, an extremely strong correspondence between Care and Cooperative negotiating behaviors, and a similarly strong correspondence between an absence of Care (Low Care) and Competitive negotiating behaviors. Care is directly related to Cooperation and inversely related to Competition in negotiation.

It now becomes important to discover where Justice fits into this picture. In terms of negotiating behavior, is a concern for Justice more likely to manifest itself as Cooperative or Competitive negotiation? Table 11 shows the relationship between these patterns.

**TABLE 11. COMPARISON OF GROUP ASSIGNMENTS BETWEEN THE HIGH AND LOW JUSTICE AND THE COOPERATIVE-COMPETITIVE GROUPS**

Gender of Rated Attorney	Attorneys in Group		
	High Justice	Low Justice	N*
Cooperative	127 (92%)	11 (16%)	138
Competitive	11 (8%)	58 (84%)	69

\* Total number of rated attorneys is 207.

As Table 11 demonstrates, there is a very strong correspondence between High Justice attorneys and the Cooperative pattern of negotiation: of the High Justice attorneys, 92% were identified as Cooperative negotiators in the Phoenix II study, with the remaining 8% identified as Competitive. Or restated in terms of 138 Cooperative attorneys discovered in Phoenix II, 127 were in the High Justice group and only 11 in the Low Justice. Looking then at the Low Justice category, 16% of the Low Justice attorneys were Cooperative, while the remaining 84% were Competitive. Restating this in terms of the Competitive category, of the 69 Competitive negotiators in Phoenix II, 11 were in the High Justice group and 58 were in the Low Justice. Just as there is a strong correspondence between Care and Cooperation, there is a similarly powerful relationship between Justice and Cooperative, and between an absence of Justice (Low Justice) and Competitive or aggressive negotiating behaviors. We find, then, that both Care and Justice are directly related to Cooperation, and both are inversely related to Competition.

This seems to us a remarkable set of findings with implications far richer than we had supposed, or than we can explore fully in this paper. In our discussion of the negotiation hypotheses, we commented on the parallels between the feminist literature and the negotiation literature: both tend to interpret behavior in terms of two predominant patterns (Care-Justice in one; Cooperation-Competition in the other); both also tend to regard one pattern as stronger and the other weaker (Justice and Competition are stronger; Care and Cooperation weaker). We also noted a departure from this parallelism. In the negotiation literature there are recurrent challenges to ethical sufficiency of certain Competitive negotiating practices; we did not find similar challenges to the morality of Justice. Taken together, the findings in Tables 6a, 6b, 10 and 11 offer an explanation for this departure. In simplest terms, while there is a direct relationship between Care and Cooperation, it does not follow that there is a similar relationship between Justice and Competition. Rather, we found that Justice and Competition (like Care and

Competition) are inversely related. Competitive negotiating behaviors are rated not as an implementation of the Ethic of Justice, but as a departure from Justice. If anything, Justice may be considered as standing in opposition to, and as a possible antidote to, the ethically suspect behaviors of Competition. This helps to explain the concept of Justice has not been subject to the kinds of attacks in the feminist literature that Competition has in the negotiation literature: Competition is not a manifestation of Justice, but rather a departure from it.

However, this discussion has not yet taken into account the views of feminist scholars such as MacKinnon who interpret Care and Difference as symptoms of inferior status or a manifestation of powerlessness and submissiveness to male political supremacy, which she calls Dominance.<sup>242</sup> While MacKinnon does not directly equate Dominance with an Ethic of Justice, there is at least an inference that Justice, being identified in the literature with a male perspective, is aligned with Dominance. Although our analysis does not attempt to test for MacKinnon's Dominance in the rated attorneys, our data do speak to the possible relationship between Dominance and Justice. For example, our findings show that Care and Justice are both positively related to effectiveness, and both are positively related to the Cooperative negotiating pattern. This suggests that Care is no less powerful or effective in negotiation than Justice or Cooperation. In contrast, an absence of Care (Low Care), like an absence of Justice (Low Justice), is related to ineffectiveness in negotiation and to the Competitive negotiating pattern.

Based on the strong correlations among Care, Justice, Effectiveness, and Cooperation, it would appear that Justice and Cooperation should be included together with Care in MacKinnon's analysis, and that Dominance should be recognized as something different, something not justified or legitimated by the Ethic of Justice. From this perspective, Dominance and Competition emerge as counterpoints or opposites to the concepts of Care, Justice, and Cooperation. This suggests that challenges to the ethical appropriateness of certain Competitive negotiating practices in the legal literature might appropriately be extended, not to Justice, but to MacKinnon's Dominance concept. Furthermore, it suggests that MacKinnon may be overgeneralizing when she associates Dominance with males and Difference with females. Rather, at least as far as legal negotiation is concerned, the difference is between Care, Justice, and Cooperation, on one hand, and Dominance and Competition, on the other.

This suggests that, in the future, the negotiation literature should perhaps shift away from a conception of Care and Justice as opposites and move toward a fuller explanation of both qualities in the negotiation context and an emphasis on ways for women and men to recognize and embody the qualities in their negotiation practices. It also suggests the need for further work on the meaning and appropriateness of Competition or Dominance in negotiation. If Cooperation and effectiveness are able to expropriate Justice, what is left to justify Competition? This is perhaps the most pressing question that remains for the future.

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242. C. MACKINNON, *supra* note 101, at 38-39.

While the Care-Justice variable sets identified in this paper are useful for the further study of the Care and Justice hypotheses, they have more limited value as explanations of attorney negotiating behavior. Based on our findings, the Cooperative-Competitive patterns are considerably more useful than Care-Justice in interpreting the negotiating behavior of attorneys.

### B. Interview Data

In addition to the Phoenix II survey, this paper considers data from intensive, semi-structured personal interviews with four male and eleven female lawyers conducted in 1989. The interviews were exploratory in nature, covering a broad range of ethical and professional responsibility issues. The sample population is demographically diverse, representing a wide-range of experiences and perceptions.<sup>243</sup>

Many interview questions were adapted from Carol Gilligan's research on feminine moral psychology<sup>244</sup> and the work of Belenky<sup>245</sup> on feminine epistemology. Some questions posed hypothetical ethical dilemmas; others sought responses to conceptual schemes from feminine moral psychology, feminist jurisprudence, and professional responsibility. Respondents were asked about their reasons for entering the legal profession, the nature of a lawyer's moral obligation, conceptions of self-identity, ethical concepts important to legal professionalism, and ethical concerns about legal dispute resolution practices. While not the primary focus of the interviews, issues relating to negotiation practice were discussed with all respondents. Interview subjects were invited to comment on personal experiences, attitudes, and perceptions of other lawyers. Except where noted, the findings reflect the views of the majority of lawyers interviewed.

All interviews were recorded and fully transcribed. A content analysis of the data identified perceptions of ethical values, moral responsibilities, and experiences in dealing with ethical matters in light of theoretical frameworks developed by Gilligan and Belenky and negotiation patterns classified by the Phoenix I and II surveys. Differences between the responses of male and female lawyers were

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243. One male and one female interview respondent were law students; two males and three female attorneys were solo practitioners. One male attorney worked for a dispute resolution firm with six associates, none of whom were lawyers. One female worked in a law firm with four attorneys. Three female attorneys worked for law firms where the numbers of attorneys ranged from nine to twelve. One female attorney was unemployed at the time of the interview. Two female attorneys were members of law school faculties. Type of practice for the three practicing male attorneys was general, two of the three only handled cases through negotiation or mediation rather than full trial. The seven practicing female attorneys represent a range of practice experience: three specialize in domestic relations, although they also take some other cases; one focuses on appellate litigation; and four emphasize general practice. Ages of respondents ranged from twenty to sixty-nine. The age groupings were as follows: 20-29 (one male, one female); 30-39 (one male, four females); 40-49 (one male, four females); 50-59 (one male); and, 60-69 (one female). One female's age is unreported. Two female attorneys were black; all others were Caucasian. All interview respondents were residents of Colorado.

244. See C. GILLIGAN, *supra* note 2.

245. See BELENKY & CLINCHY, *supra* note 52.

identified and analyzed. Following is a discussion of interview findings that pertain generally to negotiation processes and to the Phoenix II survey.

### 1. Care and Cooperation Valued by Males and Females

Care and Cooperation are cited by a majority of male and female interview respondents as important characteristics of competent lawyers. Both males and females state they value Caring and Cooperative legal problem solving strategies. That both male and female lawyers are sympathetic to the Care/Cooperative perspective is suggested by interview reference to adjectives that characterize Cooperative negotiation patterns as reported in the Phoenix I study.<sup>246</sup> For example, males and females interviewed emphasize the importance of regarding the client as a person and not an object and also maintaining and developing a personal relationship with clients, although they note it is inappropriate to become too personally identified with the client's cause; in fact, one interview respondent describes an immoral lawyer as overly identifying with a client's position to the point that he or she assumes the client's grudge. In keeping with Williams'<sup>247</sup> Cooperative negotiating pattern, both male and female interview respondents stressed the importance of meeting the needs of all parties involved in the negotiation process and establishing good personal relationships with clients as well as opposing parties.<sup>248</sup> The interview discussions also reflect the Care-Cooperative focus on effective communication. Both male and female lawyers stress the importance of lawyers communicating openly and honestly with clients and colleagues.

Illustrative of the interview finding that male attorneys value Cooperative and Caring behaviors are comments of a male mediation lawyer:

Question: You said that it was very important to care for your client. What does that mean? What does caring mean in the law?

Answer: Well, an example that jumps to mind is a case concerning a divorce client. I had explained very carefully at the outset what my approach to the case was and that was agreed to. But as the case proceeded, it became more and more obvious to me that the client's interest was really more in getting even. So, it was not caring for this client for me to continue to use a negotiation approach. And so I referred that client to another attorney. It was a very well-paying client, and this person in many ways I liked. . . . So the best thing I could do

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246. See *supra* note 218.

247. See G. WILLIAMS, *supra* note 138.

248. However, in the Phoenix II data, attorneys generally perceived opposing counsel as being relatively unconcerned with the relationship between counsel (attorneys uniformly scored low on the variable "concerned with maintaining reputation with you").

for her was to refer her to an attorney more consistent with her ultimate goal, which was also caring for me.

Question: So caring also involves caring for yourself as well?

Answer: Right. At an earlier time in my practice, I would have knocked myself out to reach her ends. But at this point it's too much. It takes too much out of me.

## 2. Justice and Competition Valued by Males and Females

Many attributes associated with either an Ethic of Justice or a Competitive negotiation style are cited by male and female interview respondents as important dimensions of their work. The majority indicate that being an ethical lawyer requires objectivity, skepticism, competitiveness, and analytical ability. Particularly, they cite "protecting a client's rights" as a central ethic of the profession. An immoral lawyer is identified as one who does not keep the client's interest paramount, but lets other factors interfere, such as the temptation to bill numerous hours.

## 3. Evidence of Gender Differences in Legal Problem-Solving

Gender differences in legal practice that align with the Competitive and Caring or Cooperative patterns are cited in the interviews. Males, for example, are generally viewed as more Competitive and adversarial than females and are more often characterized as producing rights and seeing legal disputes as conflicts of rights. More than females, they are perceived as valuing the autonomy of all parties participating in the legal process. Females are described as more sensitive to ethical problems than male attorneys, although their behavior is not viewed as particularly more moral. Although males and females strongly emphasize characteristics described by Gilligan as a Caring ethic, females perceive themselves and other female attorneys as focusing on specific Caring behaviors, such as having empathy with a client, and "hand holding." Females are identified by both males and females as more sensitive to the ethical dynamics of particular situations, and more inclined to question and challenge assumptions. The findings may support Blenkey's question-posing and problem-posing as a prominent method of inquiry for women who fit the Constructed Knowledge pattern.<sup>249</sup> They may also support Gilligan's position that women have divided judgment about ethical matters, and that for women single solutions are not always evident.<sup>250</sup> In contrast, male attorneys are viewed by interview respondents as guided by a more limited concept of Care, or a policy of Care, rather than more

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249. BELENKY & CLINCHY, *supra* note 52, at 189.

250. C. GILLIGAN, *supra* note 2, at 1, 16.

specific imperatives. One woman attorney describes gender differences in Caring behaviors:

I think many male lawyers tend to be more purist in their approach. They wouldn't go the next step to give what is not strictly legal advice, and they wouldn't hold the hand of a client nearly as readily as a woman. They wouldn't take the extra time, whether or not they could bill it, to walk down to the safety deposit box with an elderly client. I think those care-giving instincts are differentiated.

Females more than males remark on the personal dimension of the client/attorney relationship and identify personal ways of working with the client. Female more than male attorneys are described as more personally communicative with clients, particularly about ethical matters. Males, on the other hand, are characterized as more verbal and articulate in their public speaking and expression, including trial work. Female attorneys are also characterized as more communicative with female than male lawyers. One female family law practitioner speculated about such differences:

Maybe women just are more comfortable as colleagues talking to each other. . . . a kinder, gentler approach . . . more a sense of relationship . . . much more a feeling of clueing me in . . .

(For men) it's hardball. . . . They keep doing it without seeming to have stress with it and love the day in court when they really rolled up their sleeves and tried to cheat somebody out of property and so forth. Perfectly happy to bring in witnesses that would say all kinds of things.

Male and female attorneys perceived women to be more contextual and tolerant in their attitude and disposition toward legal problems, a quality that relates to the capacity for situational and contextual thinking which both Gilligan and Belenky claim are important outlooks for females.<sup>251</sup> In fact, female attorneys are identified as more sensitive than males to the relentless contextuality of negotiation problem-solving and more suited to negotiation than litigation. However, females are regarded as more responsive to the ethical dynamics of particular situations, and more inclined to question and challenge assumptions. Belenky identifies question-posing and problem-posing as a prominent method of inquiry for women who fit the Constructed Knowledge pattern.<sup>252</sup> Also, Belenky indicates that women who follow the Connected Knowing pattern refuse to make judgments.<sup>253</sup> The findings also support Gilligan's position that women have a

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251. BELENKY & CLINCHY, *supra* note 52, at 188-89; C. GILLIGAN, *supra* note 2, at 19.

252. BELENKY & CLINCHY, *supra* note 52, at 189.

253. *Id.* at 116.

divided judgment about ethical matters, and that for women single solutions are not always evident.<sup>254</sup>

Female more than male lawyers emphasize the importance of achieving balance between family and professional dimensions of their lives, although many males acknowledge the importance of weighing professional and personal demands. Females interviewed tend to characterize the problem of balance as an ethical conflict and Caring, whereas males perceive the dilemma as a matter of time management.

#### 4. Centrality of Ethics to Professional Decisions

Male and female attorneys frequently mention the importance of opportunities for ethical expression in their professional work. Those attorneys who perceived a lack of moral expression in their work experienced great stress, and as a result sometimes changed to a different type of practice, reduced their work hours, or altered the way they solve legal problems. Both males and females indicate that the opportunity for ethical expression is fundamental to their choice of profession and the way they conduct their professional lives. When interviewed about reasons for entering the legal profession, males often cite practical opportunities to pursue their legal training not only for the chance to earn a good income and achieve stature within the community, but they also express strong interest in addressing social concerns. Compared to the responses of female lawyers, males' ethical motivations for pursuing a legal career tend to be less specific and relate to general political and social activities. With few exceptions women cite ethical ideas as a major factor in their decision to enter law school and become lawyers. Three females surveyed indicate that ethical reasons were not a primary factor in their decision to go to law school, although these same women expressed a desire to use their legal training to address important political and social issues, such as civil rights and civil liberties. When asked for specifics about moral reasons for pursuing a legal career, the majority of females mentioned opportunities to help women, families, and economically and socially disadvantaged members of society. One woman law student replied:

Well, I kind of wanted to change the world, but that's just something you do on the side . . . . I have been on welfare. I have been an AFDC mom and that's how I got through school. Part of my reason for going to law school was to be a representative for them. To stand up for women who couldn't do that. If you walked up and tried to open doors, they wouldn't open. And I just feel that with being a lawyer, things start opening.

It is important to recall Gilligan's claim that women are defined by their many contexts, a web of relationships which color their moral orientation. Thus

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254. C. GILLIGAN, *supra* note 2, at 1, 16.



attorneys' attitudes about perceptions of achieving balance between family and professional demands and responsibilities certainly throw light on their possible affinity to an ethic of Care or Justice in relation to their work. Although many males acknowledged the importance of weighing professional and family demands, as noted above, females seem to see the problem of balance as a strong ethical conflict, whereas males perceive the dilemma as a matter of time management.

For both male and female lawyers, the perception of few opportunities for moral expression in their work causes significant frustration, often leading to change of work environment or method of work. Males and females frequently expressed frustration at being regarded by their law firms as "profit centers." This perception is a strong source of ethical conflict for the majority of attorneys interviewed, particularly for females who perceive that monetary success is won at the sacrifice of time with family and more efficient ways of solving legal problems. One middle-aged female corporate lawyer observes:

There is pressure within a law firm to be a profit center, and the only way to do that is to bill time, so the longer...it takes you to solve the problem and the more controversial it is, and the more procedural you can make it, the richer you are. The more successful you are as a lawyer. As a human being, to me, it just eats me up. I just can't do that.

Females seem to perceive that they will not be viewed as successful unless they are litigating and generating high revenues. Clearly, most females interviewed regard women as frustrated by this dilemma so much so that they either leave the profession, become male-like, or exhibit Justice characteristics in their decision-making methods and in their relations with colleagues and clients. For example, a female corporate lawyer with several small children remarks:

Many women aren't really satisfied lawyers. I think a lot of it has to do with this continual pressure to generate clients and bill hours and to be financially successful. I've found very little balance. And law firms historically have not been very humane, so the lack of opportunity to work part-time, or the ability to have a child or to take a year off and come back to some kind of situation you feel legitimizing . . . is a big issue. A big issue. Frankly, they've (law firms) become these money machines. And if you're not churning it out, if you're not as productive as someone else might be, they tend to look very shortsightedly at that.

Males too find the pressure to be a "profit center" intolerable. Three of the four males interviewed had abandoned corporate legal practice to escape demands for billing high numbers of hours.

Males and females indicate they regularly think about ethics and that ethical considerations frame many of their professional decisions. Males and females perceive personal ethics as significantly relevant to their professional responsibilities and practice, to the way they think about law, their choice of type of practice,

and their selection of dispute resolution methods. Male and female lawyers mention experiencing personal conflict with the ethics of the adversary system. For the majority of lawyers interviewed, the adversary system is a source of intense ethical and emotional conflict. Both male and females experience a high degree of stress litigating cases and representing clients they perceive as ungracious, dishonest, and even morally repulsive. Male and female lawyers who feel a sense of conflict with the adversary system are extremely troubled by the confrontational and adversarial nature of litigation methods.

Assuredly, female attorneys and feminist theory have strongly criticized adversarial and Competitive methods of legal problem-solving and, as a result, may be influencing the degree to which Competitiveness is regarded as a viable, first-choice dispute resolution method. Although the cost and time required for litigating disputes are the focus of much attention, the Competitive and adversarial methods used in addressing legal disputes also have come under fire. Ironically, both male and female respondents describe the legal profession as becoming more Competitive. Thus it would seem that while the dominance of confrontational methods for resolving legal disputes may be on the decline, competitiveness among lawyers for profits, business, and advertising may be increasing.

## **5. Ethical Expression in the Negotiation Process**

Males and females interviewed express a strong preference for solving their client's legal problems through negotiation and mediation rather than through litigation. In fact, many indicate they personally find more ethical expression in negotiation than in other dispute resolution methods, although female respondents expressed somewhat stronger preference for addressing legal disputes through negotiation. One male sole practitioner in his mid-twenties remarks on his preference for negotiation, "My nature tends to be more toward negotiation. Even when I was an advocate, I would try to work out a solution. We didn't call it negotiation, and we didn't call it mediation. But in a lot of cases, that's what I was doing." The choice of negotiation style might be seen, in part, as reflecting the ethical orientation of the lawyer.

Lawyers interviewed perceive that attorneys choose alternative forms of dispute resolution instead of litigation partly because they feel more ethically comfortable with such methods. An interesting contradiction between the interview and survey data relates to possible gender differences in negotiation Competitiveness. The perception of both female and male lawyers interviewed is that females are less Competitive than males. While some interview respondents are reluctant to align Competitive and Cooperative labels with gender, the majority of lawyers view males as more inclined toward Competitive patterns for both litigation and negotiation processes than females. Males are described by interviewees as more comfortable with adversarial posturing, confrontation, and making "take it or leave it" demands. Females interviewees believe that they are most effective when they are Competitive, and that they need to behave in a Competitive manner in order to be Effective negotiators. They are perceived as

feeling they must "buy into" the perceived male norm in order to be successful and to best serve their clients. One female lawyer justified her adversarial strategies in terms of Caring imperatives. In response to the question, "Do you have difficulty with the ethical requirements of the adversary system?" she responded:

I'm not sure. I'm not sure. It seems to me that on the one hand I can defend the system itself because of the age-old argument "you're in the adversary system and you have a defense." That's just the way it is. You can't go around deciding who is wrong and then nailing them. You just can't do that. On the other hand, there are times when I find it very difficult. So I guess I have to have a certain amount of faith. I think there's a certain amount of advocacy that's important to me in this job. I'm sure I'm going to have times when I wish I was a stewardess.

I talked to a woman who was just starting law school. She said, "I just don't know how to look at both sides of a legal dispute." I said, "pretend it's your child." That's the only way I know how to do it. That's to see the plaintiff as one of my kids and the defendant as another. I will defend this child. That is the way I look at it. I think women tend to put their own clients in those situations. People that they love and people that they care about.

In the Phoenix II data, although a majority of female attorneys (64%) were identified with the Cooperative style, a minority (36%) were identified with the Competitive approach. Also the percentage of negotiators characterized as Competitive was somewhat higher for females than for males (36% and 22% respectively). These statistics invite speculation, but finally are difficult to interpret. One explanation is that females were ranked by male opponents, and that males were biased in labeling women's behavior as Competitive when they would have rated the same behavior in men as Cooperative. Informal feedback by a group of female trial attorneys on the Phoenix II findings challenges this interpretation, suggesting that many women in law practice must adopt Competitive tactics to overcome culture-based stereotypes of women as weak and compliant.

Male and female interview respondents generally referred to aggressive tactics by female lawyers in negative terms, indicated they view females as more Effective when using a Cooperative than a Competitive approach.

#### IV. CONCLUSION AND IMPLICATIONS

Ethical responsibility lies at the very heart of professionalism. Lawyers derive, by way of their moral obligations, special status from colleagues, clients, employers, and the public. A Hastings Center report on the *Public Duties of the Professions* illuminates the moral dimensions of professionalism:

In ethical terms, to be a professional is to be dedicated to a distinctive set of ideals and standards of conduct. It is to lead a certain kind of life defined by special virtues and norms of character. And it is to enter into a sub-community with a characteristic moral ethos and outlook.<sup>255</sup>

For a lawyer, the basis of virtue and ethical justification is found in standards and regulations, courtesies and customs, public needs and expectations, or personal beliefs and inclinations. In the past, most legal norms were established by lawyers who were male. The large scale entry of woman into the legal profession, and the emerging literature on the Ethics of Care and Justice, raises fundamental questions about the adequacy of existing ethical norms for accommodating the moral values of female and male lawyers alike. Will ethical decision-making differ for male and female lawyers? Will feminine ethical sensitivities affect, for better or worse, the way law is practiced, disputes are resolved, and justice is delivered? Our paper has focused on one dimension of this quandary by asking whether negotiation behavior is related to underlying ethical or moral orientations of the women and men involved.

The data presented here on Care and Justice in negotiation is helpful but not conclusive. The empirical data and the Colorado interview data support current feminist legal scholarship in supporting the value of Care within the legal context.<sup>256</sup> On the other hand, since the Phoenix II research was not originally designed to test for Care or Justice variables, the findings should be considered tentative at best. We hope they will stimulate other researchers to improve upon the measurement of Care and Justice among lawyers. In the data, High Care and High Justice ratings corresponded to a broader concept identified as Cooperation, while Low Care and Low Justice ratings corresponded to Competition. This finding is significant, since the cluster analysis used to identify consistent Cooperative and Competitive negotiation patterns for the Phoenix II data was based on all variables in the survey and, therefore, stands independent of theories postulating gender-related ethical orientations.

Although the Williams research was not focused exclusively on ethics, it produces empirical descriptions of attorney negotiating patterns which permit a comparison of the ethical dimensions of reported behavior for Cooperative and Competitive negotiators.<sup>257</sup> The findings show rather dramatic differences between Effective attorneys in these two categories. To take the most obvious example, the highest objective of Cooperative attorneys (as rated by their opponents) is to conduct themselves ethically; they are seen as fair-minded, forthright, and willing to share information, which add to the meaning of "ethical" for this group. By comparison, the highest rated objective for Competitive attorneys is to maximize the outcome for the client; and they are seen as willing to stretch the facts to achieve that goal. Nevertheless, these Competitive

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255. Jennings, *Public Duties of the Professions*, 1984 THE HASTINGS CENTER REP. 5.

256. See generally Gilligan & Attanucci, *supra* note 7.

257. See G. WILLIAMS, *supra* note 138, at 15-41.

negotiators are also given a positive rating for being ethical. This suggests at least two modes or orientations toward ethical conduct among attorneys: one is oriented to concepts of "fairness" valued by Effective Cooperative negotiators and preferred by commentators such as Gordon,<sup>258</sup> and Fisher and Ury;<sup>259</sup> the other is a different standard associated with the practice of Competitive bargaining, as defended by White.<sup>260</sup> The attachment of both sides of this dialogue to their individual viewpoints is a demonstration, perhaps, of the continuing relevance and vitality of the Cooperative-Competitive distinction.

It is significant that males and females lawyers in the Denver interviews indicated that personal ethics concerns were integral to their decisions to enter the legal profession, and continue to influence their decisions about pursuing a particular type of legal practice, being reconciled to the adversary system, and choosing among legal dispute resolution methods. The selection of negotiation over litigation is often seen as an ethical choice. In the Colorado interview data, Cooperative or Competitive styles of negotiation are perceived as partially reflecting Caring or Justice ethical frameworks. However, the empirical analysis of the Phoenix II data revealed that Cooperative negotiators rated high on both Care and Justice attributes, and Competitive negotiators rated low on these attributes. Therefore, it is unlikely that negotiation style reflects a polar Care or Justice ethical orientation. Instead, it is more likely that an "ethical" negotiation orientation typically encompasses qualities of both Care and Justice together.

A growing body of feminist theory is critical of confrontational problem-solving methods. The increase in law school alternative dispute resolution training, and the more Caring approach of the most widely used negotiation text, Fisher and Ury's *Getting to Yes*, show a preference for a more Caring and Cooperative orientation toward negotiation. Further, many judicial jurisdictions are now mandating a good faith effort at some form of "alternative dispute resolution" prior to allowing a case to proceed to trial, thus putting even more pressure on advocates to achieve negotiated settlements.<sup>261</sup>

Data from the Phoenix II survey indicates that, among other characteristics, to be perceived as effective negotiators, male and female attorneys alike need to display behaviors that are both Caring and Just. There is no strong evidence in the data to support a contention that men uniquely follow a Justice paradigm or that women are primarily motivated by a Care ethic. Based on the data analysis, male attorneys are perceived, on average, as being at least as Caring as their female colleagues. Likewise, most of the male attorneys in the Colorado interviews identify strongly with Care principles in describing their orientation to

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258. See Gordon, *supra* note 166.

259. See R. FISHER & W. URY, *supra* note 141.

260. See White, *supra* note 1; White, *supra* note 171, at 116-20.

261. Of course, there is a continuing question whether this increased pressure to settle is either wise public policy (since it may preclude the articulation and clarification of important societal values) or fair to the interests of litigants. See generally Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

clients and to their professional practice generally, although to a lesser extent than do their female colleagues in the interview population.

Insofar as negotiating behavior and an ethical orientation to law practice are concerned, neither Care nor Justice is sufficient for any one attorney. Attributes of both appear to be important for an attorney, independent of gender, to be perceived as "effective." High Care and High Justice ratings in negotiation both appear to be associated with the broader notion of Cooperation, a notion which seems to imply both Care and Justice, and is thus a more inclusive ethical orientation toward the practice of law than can be accounted for in the existing literatures on feminist legal thought and moral development.

## Appendix A

This Appendix lists the highest ranked characteristics of the cooperative and competitive groups of negotiators according to their rating as "effective" or "ineffective" negotiators. The data also included groups rated as "average" negotiators, but they are not reproduced here.

The survey instrument was divided into three sections: Adjective Checklist, Bipolar Adjective Scales, and Motivational Objectives. The lists follow the same organization.

### Section 1. Highest Ranked Characteristics from the Adjective Checklist

#### Effective Cooperative Group

1. Experienced
2. Realistic
3. Ethical
4. Rational
5. Perceptive
6. Trustworthy
7. Convincing
8. Analytical
9. Fair
10. Creative
11. Self-controlled
12. Versatile
13. Personable
14. Adaptable
15. Wise
16. Objective
17. Poised
18. Careful
19. Organizing
20. Legally astute

#### Effective Competitive Group

1. Convincing
2. Experienced
3. Perceptive
4. Rational
5. Analytical
6. Creative
7. Ambitious

8. Dominant
9. Forceful
10. Realistic
11. Tough
12. Self-controlled
13. Clever
14. Poised
15. Ethical
16. Legally astute
17. Adaptable
18. Versatile
19. Egotistical
20. Trustworthy

### **Ineffective Cooperative Group**

1. Ethical
2. Complaining
3. Personable
4. Fair
5. Gentle
6. Conservative
7. Trustworthy
8. Masculine
9. Staller
10. Obliging
11. Demanding
12. Cautious
13. Deliberate
14. Experienced
15. Patient
16. Moderate
17. Forgiving
18. Argumentative
19. Idealistic
20. Sociable

### **Ineffective Competitive Group**

1. Irritating
2. Egotistical
3. Argumentative
4. Quarrelsome
5. Headstrong
6. Impatient



7. Greedy
8. Demanding
9. Loud
10. Intolerant
11. complaining
12. Rude
13. Conniving
14. Sarcastic
15. Impulsive
16. Suspicious
17. Unpredictable
18. Evasive
19. Hostile
20. Bluffer

**Section 2:     Highest Ranked Characteristics from the Bipolar Adjective Scales**

**Effective Cooperative Group**

1. Honest
2. Courteous
3. Adhered to customs and courtesies of the bar
4. Intelligent
5. Knew the needs of his clients
6. Friendly
7. Trustful
8. Reasonable
9. Sincere
10. Tactful
11. Forthright
12. Thoroughly prepared on the factual elements
13. Willing to share information
14. Facilitated
15. Did not use threats
16. Logical
17. Accurately estimated the value of the case
18. Thoroughly prepared on the legal elements of the case
19. Probed my position
20. Knew the needs of my client

### **Effective Competitive Group**

1. Aggressive
2. Attacked
3. Effective trial attorney
4. Intelligent
5. Thoroughly prepared on the factual elements
6. Active
7. Knew the needs of his client
8. Honest
9. Adhered to the customs and courtesies of the bar
10. Thoroughly prepared on the legal elements
11. Careful about timing & sequence of actions
12. Skillful in reading my cues
13. Tactful
14. Probed my position
15. Logical
16. Wide range of bargaining strategies
17. Got to know my personality
18. Was willing to move from original position
19. Accurately estimated the value of the case
20. Emotionally detached

### **Ineffective Cooperative Group**

1. Honest
2. Forthright
3. Trustful
4. Willing to share information
5. Courteous
6. Adhered to customs & courtesies of the bar
7. Sincere
8. Friendly
9. Cooperative
10. Knew the needs of his client
11. Logical
12. Did not use threats
13. Facilitated
14. Tactful
15. Was willing to move from original position
16. Intelligent
17. Reasonable
18. Got to know my personality
19. Thoroughly prepared on the factual elements
20. Flexible

### **Ineffective Competitive Group**

1. Aggressive
2. Attacked
3. Active
4. Knew the needs of his client
5. Honest
6. Unwilling to stretch the facts
7. Thoroughly prepared on the factual elements
8. Informal
9. Thoroughly prepared on the legal elements
10. Willing to stretch the rules
11. Emotionally detached
12. Adhered to customs & courtesies of the bar
13. Hired an investigator for investigation
14. Revealed information early
15. Courteous
16. Careful about timing & sequence of actions
17. Intelligent
18. Did not use take it or leave it
19. Concerned about how I would look
20. Did not use threats

### **Section 3: Highest Ranked Characteristics from the Motivational Objectives**

#### **Effective Cooperative Group**

1. Conducting himself ethically
2. Maximizing settlement for his client
3. Getting a fair settlement
4. Meeting his client's needs
5. Satisfaction in exercise of legal skills

#### **Effective Competitive Group**

1. Maximizing settlement for his client
2. Obtaining profitable fee for himself
3. Outdoing or outmaneuvering you
4. Conducting himself ethically
5. Satisfaction in exercise of legal skills

### **Ineffective Cooperative Group**

1. **Conducting himself ethically**
2. **Maximizing settlement for his client**
3. **Meeting his client's needs**
4. **Getting a fair settlement**
5. **Maintaining or establishing good personal relations with you**

### **Ineffective Competitive Group**

1. **Maximizing settlement for his client**
2. **Outdoing or outmaneuvering you**
3. **Obtaining profitable fee for himself**
4. **Improving reputation in his firm**
5. **Conducting himself ethically**

